The Reform Project

Progressive, enlightened voices from the Arab Muslim world

Towards a

Model Curriculum

For the reform of the educational syllabus

in the teaching of the humanities

[C] Courses:

Revisiting the Legal Heritage

[C] COURSES - REVISITING THE LEGAL HERITAGE

While law, in any cultural tradition, is a highly technical subject that requires a long investment of study and specialisation, a reforming curriculum can nevertheless usefully engage with the conceptual context in which law is developed, and open up thereby the student's perception of the legal heritage to new horizons of justice and rights. Some of these perspectives will be inherent to the tradition, others culturally legitimate adaptations to new perspectives thrown up by a globalizing environment.

The purpose of the *C Courses* is to introduce the student to the development of Islamic *fiqh*, the historical environment shaping its traditional methodologies, and illustrate the approaches that are proving successful in the harmonisation of contemporary reality with these Islamic cognitive models. The Units in this section of the *Curriculum* will therefore:

- introduce the student to the source materials for Islamic law, highlighting the dynamic of the collection process, the cultural, doctrinal, historical and political influences on the evolving corpus, the evolution of the *isnād* testimony and the background and methodology of the *ṣaḥīḥ* collections;
- outline the cultural, doctrinal and political influences on the historical development of *fiqh;*
- trace in outline the stabilisation of the jurisprudential arena into the major established schools of *fiqh and* the historical development of *fiqh* methodology;
- explain the implications of the progressive sacralisation of *fiqh*, its ethical consequences and implications for legal thinking in a contemporary era that is demographically and culturally interconnected.

Preparatory discussion

The value of a historical approach

In this task, the dialogic process explored above in the course on the *Scripture in History* also vindicates a historical understanding of the development of law. A historical approach that employs modern methodologies can provide answers to many questions on the nature and evolution of the corpus of Islamic *fiqh* by highlighting, for instance, the influences of the local environment, of political pressures, cultural challenges and of personalities upon the rulings elaborated and adopted by the early jurisprudents (which later came to be unjustifiably sacralised into an immutable authority). Such questions are highly pertinent to the task of contemporary jurisprudence. Today's students, and tomorrow's *fuqahā'*, are tasked with the problem of reconciling the fast pace of developments in the contemporary world, with a set of values derived from the foundational sources of Islam and consistent with the rich heritage of jurisprudential thought.

This is a considerable endeavour, and embraces three major tasks:

i. *How to derive rulings from the fixed Sharī'a sources for a changing world and contemporary life* in all its highly complex, inter-combined and tangled features, with rulings derived from the absolute, authoritative, transcendent Text that can remain adaptable to a reality that is volatile, varying, material and individualised;

ii. *How to develop the criteria and instruments for a dynamic, functional fiqh* – how to distinguish between that which is fixed in the *ijtihādāt* of their predecessors and that which can change and be adjusted;

iii. *How to effect this reconciliation without doing a violence to the heritage* – how to develop the instruments and methodologies to interact with all these aspects in a balanced way that secures benefits at the same time as minimising cultural damage.[1]

The work of the contemporary progressive *faqīh* is to elaborate consistent methodologies and instruments for dealing with these three tasks, mechanisms that can harmonise with the cognitive models on which the jurisprudential endeavour has historically been based. At the same time they work to invest these mechanisms with the capacity to discern the essential from the non-essential, the immutables (*al-thawābit*) from the mutables (*al-mutaghayyirāt*).

Conventional pedagogy in the field of Islamic law is proficient in expounding the internal dynamics of *fiqh* and its relation to the Sharī'a source materials. However, the application of this dynamic to the external context of new challenges – which are radically different from anything that the Islamic legal tradition has had to address to date – remains tentative and lacks confidence.

By illustrating the dynamics of the development of Islamic *fiqh*, by embedding it in its historical contexts, *Courses C1* to *C3* seek out the inherent liberating potential of the legal endeavour, so as to equip students to interact with self-confidence with the fast-developing pace of contemporary life.[2] In presenting these Courses the educator will potentially be making a direct contribution to the broader background training for the next generation of legal scholars to elaborate the appropriate *ijtihād* for this vital task.

Islamic law – clarifying definitions

Since there is frequent confusion among students between the terms *sharī'a* and *fiqh*, the educator will likely need to clarify at the outset what is meant by these terms, and how a clarification of these terms will define what follows. This preparation will underline how, in Islamic terms, the two are not of equal weight: the 'raw material' for the Sharī'a is the Qur'ān[3] and the Sunna texts, whereas *fiqh* is a subordinate discipline, not coming directly from the Qur'ān and the Sunna but indirectly from these sources. The use of the term *Sharī'a* to denote Islamic law is more of a rhetorical device than a technical definition.[4]

Fiqh (lit. 'true understanding') is the process of making rulings and judgements from evidence found in the Sharī'a sources – creating laws for matters not specifically addressed by these sources – tested and authorised by the consensus (*ijmā'*) of Islamic scholars. Where this consensus on a specific issue is unavailable, the exercise of analogy (*qiyās*) is employed. *Fiqh* is therefore best understood as *a process relying on a set of inherited uṣūl al-fiqh* – the 'Principles of Jurisprudence' or the science of Legislative Principles (the *Qur'ān, Sunna, Ijmā'* and *Qiyās*) – which direct Muslims how to develop their understanding of the divine will from the revealed texts, and establish legislation to reflect that will.

The educator may usefully illustrate here the difference between *sharī'a* and *fiqh* as the difference between an *unchanging* starting point of very broadly stated principles, the 'Islamic way', as it were in the sense of a set of ethical objectives, and a *constantly changing*

[1] These tasks were succinctly stated by Dr. Aḥmad 'Ibādī, who enumerated the difficulties that the legal profession is faced with today. See Dr. A. 'Ibādī, Foreword to الإحياء Vol. 26, November 2007, pp.12-13.

[2] "Whereas the internal context related to the internal structuring of the assembly of the Text is clear– in a general sense – from the Qur'ānic, jurisprudential heritage of the Muslims, the grasp of the external context is still in need of more research and study … Grasping this context will be one of the basic starting points for uncovering new Qur'ānic and prophetic meanings that are capable of contributing to guiding the path of both the Islamic and wider human culture" (Dr. A. 'Ibādī, الإحياء Vol. 26, November 2007, p.45).

[3] The word *Sharī'a* is mentioned only once in the Qur'ān, and not at all as a system of jurisprudence, but in its traditional meaning of the "right path" ثُمَّ جَعَلْنَاكَ عَلَى شَرِيعَةٍ مِّنَ الْأَمْرِ فَاتَّبِعْهَا *"Then We have made you follow a course in the affair, therefore follow it,"* (*Al-Jāthiya*, XLV,18).

[4] Thus R. Ahmed, *Islamic Law and Theology*, in A. Emon and R. Ahmed (edd), A. Emon and R. Ahmed (edd), *The Oxford Handbook of Islamic Law*, Oxford University Press, 2018, p.107. The author also explains how the term 'theology' is used equally rhetorically, in that it actually assumes two disciplines, *'ilm al- kalām* (dialectical argumentation on such matters as God, creation, the intellect, revelation, prophethood) and *'aqīda* (creedal works defining the parameters of accepted belief).

elaboration of precisely focused, specific, derived rulings which are responsive to altering human circumstances and the evolving levels of human knowledge. If the *Sharī'a* is the Qur'ān and the Sunna in their essence, *fiqh* is the application of that essence, the interpretation of them, and thus fallible. This preparatory clarification is an important one for the educator to make, since it outlines how the body of 'Islamic Law' is not in itself divinely mandated (as it has come to be interpreted in a politicised way by Islamists), for it is mostly a post-Qur'ānic, man-made system.[5] The problem of the intermeshing of the conception of Islamic law with matters theological is a subject that continues to divide opinion, whether Muslim-Muslim or Muslim-Non Muslim.[6] Given this human origination of the legal system,[7] the combination of transcendental and mundane perspectives has historically never been troublesome throughout the course of Islamic history. The contemporary legal arena in Muslim majority states which combine secular systems (and constitutions where Sharī'a is indicated as a guiding source), with principles derived from traditional Islamic jurisprudence to influence specific areas of law, is simply an organic continuation of this process.

[5] The distinction is important to make, since, as the *Pew Survey on Muslims' opinions on Sharī'a* published in April 2013 discovered, in 17 of the 23 countries where the question was asked, at least half of Muslims said that Sharī'a was the revealed word of God, and that this figure in the Middle East-North Africa region increased to 74 per cent. https://www.pewforum.org/2013/04/30/the-worlds-muslims-religion-politics-society-beliefs-about-sharia/

[6] "Everyone … whether purportedly working on the side of traditionalism or reform, or trying not to take sides, has theological presuppositions that underpin their approach to jurisprudence and legal theory, whether explicitly or not. Those theological presuppositions drive individual approaches to law and its application. Conversely, reforming Islamic law requires contending with the underlying theologies presumed by certain applications of law." R. Ahmed, *Islamic Law and Theology*, in A. Emon and R. Ahmed (edd), A. Emon and R. Ahmed (edd), *The Oxford Handbook of Islamic Law*, Oxford University Press, 2018, p.125.

[7] With the exception of the Qur'ān, all the sources for the Sharī'a are in fact human. They include: local customs, the Sunna (or the Prophet's examples), independent opinion, consensus, public interest, reasoning, equity consensus, old laws of culture and scriptures, presumption of continuity.

COURSE C1 - THE HISTORICAL CRADLE OF FIQH

Module C1.1 – HISTORICAL OVERVIEW OF THE DEVELOPMENT OF LAW

Understanding how the edifice of Islamic law came about and the conditioning factors of its early development is an essential illustration of the above definition.

C1.1.1 - The Qur'ān and the Prophet

In unit *C1.1.1* the educator can outline why so much of Islamic law retains within its body much that is in fact local and regional customary lore (*'urf*) relevant to a specific environment and how, in the era of the Prophet most of the legal injunctions of the Qur'ān were in the form of pre-Islamic tribal customs given an Islamic sensibility and moral legitimacy. The educator can also highlight the useful work of contemporary scholars, Muslim and non-Muslim, who focus on the role and function of Muḥammad as a charismatic leader more than as a methodical legislator, and primarily as bearer of a spiritual message, as underlined on 13 occasions in the Qur'ān as his only true function,[8] and by the fact that the Qur'ān contains only 80 or so verses featuring concrete legal pronouncements

Similarly, the educator can point to this inspirational role as determining how such legal pronouncements that Muḥammad did give changed over time to reflect changing circumstances, in the same way that his theological discourses evolved to meet the growing curiosity and sophistication of his followers. During his lifetime, therefore, both law and theology were expressed through a kind of casuistry, solving conflicts by applying general ethical, religious and moral principles to particular and concrete cases of human conduct. This meant that context was the primary driver; whenever circumstance demanded a certain law or theological doctrine, Muḥammad was able to channel a revelation that addressed that circumstance. In addition, it has been argued that the lean legislative productivity during Muḥammad's lifetime was because he assumed Jewish and Christian norms for the fledgling Muslim community, and only articulated new laws when either Judeo-Christian norms did not address the new situation, or if Muḥammad wanted to contravene those norms to differentiate his new Arab religion.[9] As a result, the educator may wish to illustrate the essential fluidity of the relationship between revelation and law by recourse to this earliest paradigm, which was one of fluidity and broad general principles that respond to, and indeed are conditioned by, changing circumstances and realities on the ground.

C1.1.2 - Early development and ad hoc jurisprudential synthesis

In unit *C1.1.2* the educator can illustrate the process of development of Islamic law during the early Medinan period which saw *ad hoc* applications of Qur'ān-inspired principles prior to the more systemised approach adopted during the Umayyad administration. In this early Medinan period (632-661) what came to be termed 'the *sunna taqrīriyya'* denoted the Prophet's tacit approval of customs which were prevalent during his lifetime and not expressly overruled by him. These customs were duly preserved by the Companions and the Caliphs themselves issued casuistic decrees, thus continuing the casuistic legacy of Muḥammad.[10] By the time of the major

[8] E.g.: *Say: O mankind! I am only a plain warner unto you* [Qur'ān XXII,49]; *So obey Allah, and obey His Messenger: but if ye turn back, the duty of Our Messenger is but to proclaim (the Message) clearly and openly* [Qur'ān LXIV,12].

[9] On this, see R. Ahmed, *Islamic Law and Theology*, in A. Emon and R. Ahmed (edd), *The Oxford Handbook of Islamic Law*, Oxford University Press, 2018, pp.108-9.

[10] Scholars have noted the similarities of the casuistic approach of early Muslim law to Jewish law of the period, a parallelism that was natural given the the close physical and geographical proximity of Jews and Muslims in this earliest Muslim state. The parallelism extends to the focus of law-making which was in both cases "formal, personal, relevant to all areas of human behavior, developed mainly by the efforts of legal scholars rather than by judicial precedent; both do not distinguish between state and religion, since both give religious law precedence over the state; both distinguish between areas associated with religious ritual (אסור והתר 'forbidden and prohibited' / عبادات) and those relating to private law (דיני ממונות 'monetary cases' / معاملات)". (See G. Libson, 'The Relationship between Jewish and Islamic Law', *Encyclopaedia Judaica*).

legal thinker Imām Malik, the post-Islamic survival of Arabian *'urf* as demonstrated in this Medina period – termed 'the practice of the Medinans' ('*amal ahl al-madīna*) – was equated with *ijmā'* ('consensus', see below) to become a solid source precedent for Islamic law. A useful calibration of the relationship between '*urf* and *Sharī'a* can be seen in the work of Ibrāhīm ibn Mūsā Abū Isḥāq al-Shāṭibī (720- 790/1320-1388) in his *Al-Muwāfaqāt fī Uṣūl al-Fiqh:*

> The *sharī'a* as a whole creates moral values … Moral norms are of two types: *The first type*: those that are customary and are closer to reason and acceptance; *The second type:* norms whose meanings could not be rationalized in the first encounter and subsequently codified (i.e. the prohibition of 'usury') … Arabs did have some legal rules even during the *Jāhiliyya*, and these were affirmed by Islam, (including) fixation of blood-money, its imposition on the '*āqila* (tribal group), rules for eunuchs, assigning of two shares to the male in inheritance … as well as other things. [11] [i]

- *DISCUSSION POINT - The Arabian cradle for Islamic law*

  The educator can usefully underline here *the implications of the Arabian cradle for the future development of Islamic law,* notably the early tensions between Arabo-centric conceptions and ethnically more egalitarian conceptions, which will later be reflected in such things as the laws of the *dhimma*, the gradation of rights (male/female and Muslim/non-Muslim) that are proving troublesome in the modern pluralistic environment.[12]

C1.1.3 - The Umayyad period and the challenges of empire

In unit *C1.1.3* the educator can illustrate the further tensions that arose during the period of the Umayyad domination, where new institutions forcibly emerged in response to the demands of a new, highly complex, imperial Muslim society that was in essence an amalgam of many cultures and inherited customs. An important feature of the educator's historical overview will be demonstrating how this amalgam was managed, and the tensions that developed between the advocates of the new Islamic religious stipulations and the advocates of local customs and Byzantine (Roman)[13] and Persian (Sassanian) laws, as these were becoming integrated – often only superficially – with a Qur'ānic patina in the rulings of Muslim *qāḍīs*.

[11] Ibrāhīm ibn Mūsā Abū Isḥāq al-Shāṭibī, الموافقات في أصول الشريعة For a translation, see I. Nyazee, *The Reconciliation of the Fundamentals of Islamic Law* (section 'Attributing knowledge of the sciences to the Qur'ān'), Vol. II Garnet Publishing, UK, 2014, pp.60-61.

[12] Rumee Ahmad highlights the deep theological-juridical implications of these tensions: "The second Caliph, 'Umar, was depicted as promoting a fatalistic, Arabo-centric God who favored the Arabs as His chosen people, much as He had earlier chosen the Children of Israel. The legal result of 'Umar's theological belief was that he actively discouraged non- Arabs from converting to Islam, and Arabs and non- Arabs had different rights and obligations under his rule; including extra taxes, special clothing, and limited political roles. In contrast, the fourth Caliph, 'Ali, was depicted as promoting a more justice- oriented, ethnically-egalitarian God; thus 'Ali accorded non- Arabs more legal rights than did 'Umar." See R. Ahmed, *Islamic Law and Theology*, in A. Emon and R. Ahmed (edd), *The Oxford Handbook of Islamic Law*, Oxford University Press, 2018, pp.109-110.

[13] The Syriac ܢܡܘܣܐ ܕܡܠܟܐ ܕܫܘܒܚܐ ܘܢܨܚܐ ('The Laws of the Christian and Victorious Kings'), a Syro-Roman law book dating from the fifth century AD, is an interesting example of a relationship between Roman and Middle Eastern legal concepts, and the struggle between the law of the state and the legal traditions of the people, which scholars have seen as setting the template for a similar combination of Islamic law with Roman law in the Syrian region. Chibli Mallat, in his study of the work, notes that: "the 130 articles in the Arabic version of the Syro-Roman Code sound so familiar to the modern Arab lawyer that the Code appears as some 'vulgate' for the uninitiated." (C. Mallat, "From Islamic to Middle Eastern Law, a Restatement of the Field," *The American Journal of Comparative Law*, Vol. 51 (2003), p.709. Some interesting studies on the influence of Roman law on early developing Islamic law are Patricia Crone, *Roman, Provincial and Islamic Law*, Cambridge University Press, 1987; Mitter, U. 'The Role of Non-Arabs in the Origins of Islamic Law."'*Sharqiyyat* 9 (1997): 107 and Ayman Daher, 'The Shari'a: Roman Law Wearing an Islamic Veil?' in *Hirundo*: *The McGill Journal of Classical Studies*, Volume III: 2005, pp.91-108.

- *DISCUSSION POINT - The imperial cradle for Islamic law*

  A fascinating feature, which the educator may highlight, is the role of Umayyad *Realpolitik* in the developing elaboration of Sharī'a norms. The Umayyad rulers did not have the prestige and authority of the Prophet, the Companions and the Orthodox Caliphs to continue the casuistic fusion of law and theology in their persons. They therefore resorted to establishing institutions that could create legal authority, and the debate on the influence of the palace on these institutions is still active: being stocked with state-sponsored scholars did these early institutions and bodies enable state policies by shrouding them in theological justifications (such as a fatalistic acquiescence to dynastic rule)? Did an independent Islamic theology emerge as a result of these prerogatives and was thus granted an overtly political stamp as some western historians have claimed? Or were these scholars more independent than previously assumed, given that the political opponents of the Umayyads found natural allies in the '*ulamā'*? [14]

Whatever the case, there was a reaction to what was perceived by Muslim traditionalists as the loss of religious ethos in Islamic jurisprudence. Essentially the problem was one of reconciling the tensions of the wings of jurisprudential thought: from those that advocated the practice of *ra'y* ('personal reasoning') to those who advocated making the template of the Medina period the ground root of legal interpretation.[15]. These last insisted that the only true source for law was the Qur'ān, following which were the words (*ḥadīth*) and paradigmatic actions (*sunna*) left behind by the Prophet. They also insisted that the best authorities for those truths were Muhammad's Companions and the most upright among his immediate contemporaries. Failure to resolve these tensions – and the perception by Muslim traditionalists that the ethos of Islam was being submerged – was one of the causes for the downfall of the Umayyad dynasty.

C1.1.4 - Resistance and rebellion – proto-Shī'ism and proto-Sunnism

In unit *C1.1.4* the educator can focus on how this reaction manifested itself. Given the nexus between politics and theology in the Umayyad period, religious resistance took the form of a counter-theology that both rejected the fatalistic theology that underpinnned the authority of the Umayyads and justified rebellion. The reaction took the form of a *proto-Shi'ī* sect that rejected the fatalism of the Umayyads by insisting that the community must be led by a charismatic authority descended from Muḥammad himself – thus continuing the casuistic fusion of law and theology that had preceded them. The early emergence of a *proto-Sunnī* sect, focused the claim to legitimacy not on a charismatic authority but on the approval of the Muslim community. The fatalism of the Umayyads was also rejected by this group, but this rejection was qualified by a complex theological formula: although God has knowledge of all things before they occur, He does not *de facto* approve of them or cause them to be so; humans choose and deserve their ultimate fate. The apparent paradox is addressed in the term *iktisāb* ('acquisition'), which holds that while God authors human acts, people 'acquire' them as products of their free will.[16]

[14] On this debate, see R. Ahmed, *Islamic Law and Theology*, in A. Emon and R. Ahmed (edd), *The Oxford Handbook of Islamic Law*, Oxford University Press, 2018, pp.110-116.

[15] The traditional assumptions among Muslim historians that there was a jurisprudential dichotomy between the Kufan "proponents of considered opinion" (*ahl al-ra'y*) and the Medinese "proponents of tradition" (*ahl al-ḥadīth*) has been challenged recently, on the grounds that it was "essentially an interpretative propensity and frame of mind, which manifested itself at the level of individual jurists in all centers and was never strictly regional". See U. Wymann-Landgraf: *Mālik and Madina, Islamic Legal Reasoning in the Formative Period*, Brill, Leiden 2013, pp.10-11.

[16] This potential contadictions of this doctrine for the issue of human responsibility continued to cause controversy the length of Islamic history, and has its roots even in the Qur'ān, as demonstrated in Sura VI (*al-An'ām*),148: *Those who are polytheists will say: If Allah had pleased we would not have associated (aught with Him) nor our fathers, nor would we have forbidden (to ourselves) anything; even so did those before them reject until they tasted Our punishment. Say: Have you any knowledge with you so you should bring it forth to us? You only follow a conjecture and you only tell lies.*

C1.1.5 – The Abbasid period and institutional groundings

After the fall of the Umayyads in the year 750, the proto-Sunni groups jostled for authority under the Abbasids and over time the various urban environments of the early Islamic empire spawned many centres of legal thought and practice, depending on the particular way individual jurists parsed the Qur'ān and integrated this with their views on customary tribal and social traditions. This progressively Islamicising law, as it developed, was essentially a scholarly discourse and since these scholars interpreted the sources in different ways and adjudicated variously between the two 'poles' of authority – the immutable first principles with their textual authority and the independent, mutable legal reasoning responding to changing human affairs (*ijtihād*) – a certain amount of disorder ensued, since highly varying opinions could be found with regard to a single legal issue. This jurisprudential fluidity, and its potential for conflict, sooner or later required the imposition of some form of systemisation.

In unit *C1.1.5* the educator can illustrate how state patronage increased the pressure to develop unified laws and legal theories, so that these could be applied consistently at a state level. Consequently, from the mid 8th century onwardes the various jurisprudential complexions that developed in the major centres of Madīna and Kūfa coalesced from a plurality of schools into four major *madhāhib* (lit. 'ways to proceed' or 'methods') that became established schools of practice. As the body of legal ideas of a given complexion crystallized, doctrines were associated with the individual religious scholar or theologian who formulated them and thus gave his name to a particular school which operated according to its specific form of legal casuistry. Thus emerged the major schools of Islamic law, named after their leading lights or founders: the Mālikī, Ḥanafī, Shāfiʿī, Ḥanbalī and Jaʿfarī *madhāhib*.[17]

These developments brought greater coherence and consistency – and political stability for Muslim rulers – because the adherents of a school were constrained to follow the opinions of the school's founding scholars. Moreover, within the confines of one school of legal thought the process of juridical anarchy was further constrained as the earlier insistence on a scholar's individual *ijtihād* (on the grounds that no *mujtahid* was infallible) gave way to the opinions of more eminent *mujtahidīn* in that school. Progressively the jurists became 'imitators', *muqallidūn*, of these *mujtahidīn*. Ultimately, the normative laws that these four schools put forth in the ninth century were seen as having cumulatively exhausted the legitimate range of legal diversity and came to be considered authoritative in perpetuity and were not to be modified or added to except in exceptional circumstances.[18]

The formation of their normative laws took place in step with the necessary effort to stabilise the source texts of Islamic law. As a result of the *ahl al-raʾy / ahl al-ḥadīth* conflict and the unfortunate proliferation of fabricated *ḥadīth* by supporters of the latter, collections of credible *ḥadīth* came into existence, one of the earliest extant examples being *Al-Muwaṭṭaʾ* of Imām Mālik (ob. 796) a manual of jurisprudence which incorporated *fiqh* principles founded upon his 1,720 selected *aḥādīth*.

C1.1.6 - Al-Shāfiʿī and the consolidation of uṣūl al-fiqh

In unit *C1.1.6* the educator can focus the student on the singular achievement of Muḥammad b. Idrīs al-Shāfiʿī (767/150–820/204) in his attempt to synthesize the principles of the various Islamizing legal doctrines into one overriding and coherent system. His motivation was consistency and he aimed specifically at removing diversity, by arguing against Persian and Roman influences on law, particularly the Roman influence for its rationalism that he believed had already infected some existing doctrines, arguing for the importance of the Arabic language

[17] The eponymous founders were, respectively, Mālik ibn Anas (715–95), Abū Ḥanīfa (700–67), Muḥammad al-Shāfiʿī (767–820), Aḥmad ibn Ḥanbal (780–855) and Jaʿfar al-Ṣādiq (700–765).

[18] This had concrete implications for the administration of the law throughout Islamic history. Thinkers such as Ibn al-Ṣalāḥ and Ibn ʿAbd al-Salām al-Sulamī affirmed a *qāḍī's* obligation to rule according to the received doctrine of his *madhhab* so that by the Mamluk period (1250–1517) they came to be obligated to adjudicate according to the established doctrines of their *madhāhib*, and subject to discipline if they diverged from them.

as the language of Revelation,[19] and arguing for the primacy of a single authoritative source (other than the Qur'ān): that is the Traditions of the Prophet, in that

> "a *ḥadīth* from the Prophet is self-validating, requiring confirmation from no other quarter … it is incumbent upon people to follow the report from the Prophet, ignoring all other reports."[20]

In so doing he set himself in opposition to the Iraqians and the Medinese whom he considered were neglecting these Traditions in favour of drawing conclusions from general rules, or merely the opinions of the Companions which were, in addition, chaotically applied.[21] His exclusive focus on the life and sayings of the Prophet was such that he changed the use of the term 'Sunna' to mean only the 'Sunna of the Prophet'.

Al-Shāfiʿī's *Risāla* or *'Epistle' on Legal Theory* is the oldest surviving and most influential work on Islamic legal theory and the foundational document of Islamic jurisprudence. Though constituting a statistical minority at the time, his work was spread by his students in Cairo, Mecca and Baghdad and the influence of his jurisprudential synthesis was such that it ironically ended up adding to legal diversity by forming the foundation for a separate legal school.

The educator can here introduce the student to the principle innovative achievements of the *Risāla*: the establishment of principles of textual interpretation to be applied to the Qur'ān and to prophetic Traditions, the techniques for harmonizing apparently contradictory precedents, the etablishment of a coherent legal epistemology, the coherent application of analogy and the setting of parameters for independent legal interpretation. This was a systemisation of analytical method to minimise errors in the derivation of Islamic rulings from the mass of evidence and thus a significant resolution of the chaotic legal controversies, in an enterprise which came to be known as *uṣūl al-fiqh* (on these see below section *C2.2 – The uṣūl al-fiqh methodologies*). The originality of his work, and the authoritativeness of his thought, also saw the establishment, or consolidation, of a new category of jurisprudential endeavour: the universal *ijmāʿ* ('consensus') of all qualified scholars both as a method of resolving the conundrum of human reasoning being employed in conjunction with the divine Text, and as a means of 'de-localising' Islamic law from the prestige of the Medinan jurists.

> ➢ *DISCUSSION POINT – The role and implications of al-Shāfiʿī's work*
>
> At this point the educator can initiate a discussion on the implications of al-Shāfiʿī's standpoints on a number of matters. Firstly, on the role and authority of the prophetic *ḥadīth*, al-Shāfiʿī's single-minded perception as to their exclusive value held that their authority was such that even the Qur'ān was "to be interpreted in the light of traditions (i.e. *ḥadīth*), and not vice versa".[22] While the Revelation had been traditionally considered above the Sunna in authority, did al-Shāfiʿī come close to sacralising the Sunna to the point that it stood on an equal footing with the Qur'ān, a virtual second Revelation, on the grounds in his words that "the Prophet's command is Allah's command?"[23]

[19] "It is obligatory upon every Muslim to learn the Arab tongue to the utmost of his power in order to profess through it that "there is no God at all but God and Muḥammad is His servant and Apostle" and to recite the Book of God and to utter in recollection what is incumbent upon him, the *takbīr* and what is commanded, the *tasbīḥ*, the *tashahhud* and other matters." فعلى كل مسلم أن يتعلم من لسان العرب ما بلغه جهده حتى يشهد به ان لا اله إلا الله وأن محمدا عبده ورسوله ويتلو به كتاب الله وينطق بالذكر فيما افترض عليه من التكبير وأمر به من التسبيح والتشهد وغير ذلك. Al-Shāfiʿī, *Al-Risāla* (ed. A. M. Shākir) p. 48 (paragraph 167). Al-Shāfiʿī was also at pains to deny that there were any non-Arabic words in the Qur'ānic text (see *Al-Risāla*, p.41 paragraphs 133 ff).

[20] Al-Shāfiʿī, *إختلاف الحديث*, Būlāq 1321/1903, p.19.

[21] J. Schacht, *The Origins of Muhammadan Jurisprudence*. Oxford, UK: Clarendon Press, 1950, p.21.

[22] J. Schacht, *An Introduction to Islamic Law* , Clarendon, Oxford 1982, p.47.

[23] Al-Shāfiʿī, *Al-Risāla* (ed. A. M. Shākir) p. 84. See paragraphs 278-9 where al-Shāfiʿī lays this out explicitly: دعاءهم إلى رسول الله ليحكم بينهم دعاء إلى حكم الله … وإذا سلّموا لحكم رسول الله فإنما سلموا لحكمه ... وانه اعلمهم أن حكمَه: حكمُه .

Secondly, by not only mapping out and establishing the discipline of *uṣūl al-fiqh* in Islam, but also centralising its importance to the Islamic faith, al-Shāfiʿī's impatience with ambiguity in legal discourse may have led to the provision of a conceptual order, but at the expense of latitude and diversity in legal thinking. On the grounds that Islam had been brought about through a single incontrovertible act of divine revelation, al-Shāfiʿī extended this incontrovertible act to defining a single 'revealed' law, one which would override local social or historical specificities.[24] Are there implications for the contemporary environment if an Islamisation of law follows this dynamic?

Thirdly, with al-Shāfiʿī's establishment of a theory of an *ijmā'* of all scholars, did the living tradition of each school become annulled in favour of the practically impossible goal of a consensus of the entire Muslim community? Was legal reasoning also truncated by limiting it to a formal process of strict analogy (on this, see section *C2.2* below), with little or no room for the discretionary reasoning that had obtained hitherto?

Finally, was al-Shāfiʿī's preoccupation with unitary authority and the setting of exclusive parameters of legal reasoning – in the face of challenges from debates on Reason and Revelation – a "ruthless innovation"[25] that effectively closed off through his prestige the meaningful development of legal thought beyond the limits of text-bound *ijtihād* and *ijmā'*? [26] Is it legitimate to continue to take the unilaterally defined perspectives of one scholar – living at a specific period in history with its particular social conditions – as an authoritative voice in the contemporary world?

Module C1.2 - THE EVALUATION OF THE LEGAL SOURCE MATERIAL

C1.2.1 - Classical ḥadīth collection and validation

The tussle between *'urf,* the imperial legal systems, and the Islamic scriptures in a newly configuring civilisation, placed at the centre of the debate the authenticity and hence legislative valency of the legal source material. Important doctrinal and theological questions had to be resolved, and authorities sourced to settle the matter. The above-mentioned debates such as the preordination of man's destiny, the freedom of mankind and the nature of sin, coupled with competing claims to possess that evidence, proved too strong an incentive to prevent falsification of these authorities by scholars unhappy with the weak levels available in the Qur'ān to justify their rulings.[27] This was particularly the case among the opponents of *ra'y* who amassed a prodigious body of this material to support their claims, much of it in the form of fabricated *ḥadīth*, in their effort to make traditionalist dogma the standard jurisprudence throughout the Islamic world. Islamic sects played a major role in the amassing of *ḥadīth* that supported their doctrinal positions and undermined those of others.[28] Political factors also heavily influenced the

[24] "Where his contemporaries and their predecessors had engaged in defining Islam as a social and historical phenomenon, Shafi'i sought to define a revealed Law" (J. Burton, *The Sources of Islamic Law, Islamic Theories of Abrogation*, Edinburgh University Press 1990, p.14).

[25] J. Schacht, *An Introduction to Islamic Law* , Clarendon, Oxford 1982, p.48.

[26] Naṣr Ḥāmid Abū Zayd argued that al-Shāfiʿī's *Risāla* was essentially a treatise on epistemology, not on *fiqh* or *uṣūl al-fiqh* as such, and since epistemology cannot be confined to one single intellectual discipline, his setting of parameters for legal thought was unwarranted, and On this, see M.K. Masud, *"Classical" Islamic Legal Theory as Ideology: Nasr Abu Zayd's Study of al-Shāfiʿī's Risāla,* n.d., pp.10-11.

[27] The statistics of this fabrication are well known: entire volumes were written in the medieval period on forgers and weak narrators such as al-Bukhārī's *Al-Ḍuʿafā'*, al-Nisā'ī's *Al-Ḍiʿāf*, Ibn Ḥayyān's *Al-Ḍiʿāf wal-Matrūkīn*, Ibn al-Jawzī's Al-Ḍuʿafā', al-Dhahabī's *Mayzān al-Iʿtidāl*, Ibn Hajar's *Lisān al-Maydān*, al-Ḥalabī's *Al-Kashf al-Hathīth*, al-Azdī's *Al-Ḍu'afā'*, al-Ḥusaynī's *Al-Mawḍū'āt* and many others. Among the reasons given were "I invented this as a *ḥisba* in order to get close to Almighty God!" (وضعتها حسبة وتقربا إلى الله تعالى - Maysara ibn 'Abd Rabbih), "we lie *for* the Prophet not *against* him, lying is merely a matter of intention" (إننا نكذب له لا عليه! وإن الكذب على من تعمده), and "when we approve something we turn it into a *ḥadīth*" (إذا استحسنا أمرا جعلناه حديثا - See Abū al-Faraj Ibn. al-Jawzī, *Kitāb al-Mawḍū'āt*, Al-Madina 1386/1966, Vol. 1 p.39).

[28] Ibn al-Jawzī gives a list of the types responsible for fabrication: 1. Extreme ascetics who lacked discrimination; 2. those uninterested in conscientious recording; 3. those whose brains were addled in old age; 4. Careless people. In the category of deliberate falsifiers he includes: 1. those who committed an error but out of pride did not subsequently correct it; 2. Zindiqs aiming to besmirch the Sharīʿa; 3. those who deliberately fabricated *ḥadīth* to support their *madhhab* "having been persuaded by Satan that this was permissible"; 4. those who invented *ḥadīth* to encourage or dissuade others in the cause of righteousness feeling that the Sharīʿa was insufficient to the task; 5. those who permitted the invention of *isnād* for anything laudible; 6. those who fabricated *ḥadīth* to gain

collation of these materials for the purpose of winning Muslim opinion to their own side, including coining traditions in the Prophet's name to support their respective standpoints[29] and, arguably, even to satisfy imperial administration demands.[30] In addition, jurisprudential rivalry also played a significant part. Although differences of opinion existed among the most prominent jurists, their followers considered even minor differences to be major and began to fabricate traditions to support their respective schools of law.[31]

The anarchy of the source collections naturally called forth an entire discipline evaluating the veracity of the *ḥadīth,* in which the names of Muḥammad al-Bukhāri, Muslim ibn al-Ḥajjāj, Aḥmad al-Nasā'ī, Abū ʿīsā al-Tirmidhī, Abū Dāwūd, Muḥammad Ibn Mājah, Aḥmad ibn Ḥanbal and others stand prominent.[32] However, the late date of these collections,[33] combined with the sheer dimensions of the task[34] which the collectors had to set themselves, raised questions even during the medieval period[35] and continues to shroud their usage with controversy.

In the earlier period when law was still an extension of Arab tribal conventions, the recording of *ḥadīth* was not a priority and the body of *ḥadīths* that existed were statistically more focussed on the sayings of the Companions and the Successors (the *Ṣaḥaba* and the *Tābi'ūn*) than of the Prophet.[36] As the conflict developed over authority, jurisprudents of the local schools of law contrasted with the 'Traditionists' who asserted that the formal traditions deriving exclusively from the Prophet superseded the "living tradition" of these local schools. The conflict created a '*ḥadīth* war' as scholars of the local schools fought like with like and, as we have seen, the demand produced the supply. This contest for authority inexorably focused upon the requirement for uncontrovertible texts, and led to the progessive narrowing of the focus onto the sayings of the Prophet.[37] The process was formalised by later scholars such as al-Shāfiʿī who insisted that the Prophet was to be considered the ultimate authority for law, second only to the Qur'ān.

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favour with the sultan by supporting his cause; 7. outright inventers of fables. See Abū al-Faraj Ibn al-Jawzī, *Kitāb al-Mawḍū'āt*, (ed 'Abd al-Raḥmān 'Uthmān), Al-Madina 1386/1966, Vol. 1 pp.36-46.

[29] Traditions fabricated during this heightened state of affairs either condemned prominent leaders or commended them. For example, one can trace how the position of Caliph Muʿāwiya became elevated through fabricated relevant traditions, and also how he was condemned in other fabricated reports. See Ibn al-Jawzī, *Kitāb al-Mawḍū'āt* (Beirut: Dār al-Kutub al-'Ilmiyya, 1995), vol.1, p.325.

[30] Examples of *aḥādīth* responding to the requirements of imperial administration can be found, especially with regards to tax collection on non-Muslims. Cf: أَنَّ عُمَرَ، كَانَ لاَ يَأْخُذُ الْجِزْيَةَ مِنَ الْمَجُوسِ حَتَّى أَخْبَرَهُ عَبْدُ الرَّحْمَنِ بْنُ عَوْفٍ أَنَّ النَّبِيَّ صلى الله عليه وسلم أَخَذَ الْجِزْيَةَ مِنْ مَجُوسِ هَجَرَ ('Narrated Bajalah: That 'Umar would not take the *jizya* from the Zoroastrians until 'Abd al-Raḥmān bin 'Awf informed him that the Prophet took *jizya* from the Zoroastrians of Hajar'), *Jāmi` at-Tirmidhī* 1587. The rewards for sourcing favourable *ḥadīth* could be considerable; according to 'Alī ibn al-Madīnī a close associate of al-Bukhārī: "*I went to the Emir of the Believers and he said: - 'Do you know a ḥadīth with a good chain of narration about someone who insults the Prophet and who is to be killed?' I said: 'yes' ... So he ordered me to be given a thousand dinars*." دخلت على أمير المؤمنين فقال لي أتعرف حديثا مسندا فيمن سب النبي صلى الله عليه وسلم فيقتل؟ قلت: نعم ... فأمر لي بألف دينار. See Ibn Ḥazm, *Al-Muḥallā*, (ed. A. M. Shākir, Al-Munīriyya, Cairo, n.d.) vol. 11, p.413.

[31] The level of the disputes could reach molecular detail, such as a fabricated *ḥadīth* that stated that the Prophet said that if one raised his hands in prayer, his prayer would not be accepted. See Ibn al-Jawzī, *Kitāb al-Mawḍū'āt* (Beirut: Dār al-Kutub al-'Ilmiyya, 1995), vol.2, p.22.

[32] There remain well over three hundred other collections in the heritage of *ḥadīth* scholarship, including such seminal works as the *Musnad* of Aḥmad ibn Ḥanbal, the *Muṣannaf* of Ibn Abī Shayba, the *Ṣaḥīḥ* of Ibn Khuzayma, the *Al-Mustadrak 'alā al-Ṣaḥīḥayn* of al-Ḥakim, and many other multi-volume collections, which contain large numbers of *aḥādīth* considered sound, but which cannot be found in the collections of al-Bukhārī or Muslim.

[33] The earliest work containing a collection of *ḥadīth*, the *Al-Muwaṭṭa'* of Aḥmad ibn Mālik, dates from 755-795 AD. The other works date from at least 75 years later.

[34] Al-Bukhārī collected about 600,000 *ḥadīths*, accepted 7,275 and considered 592,725 to be un-proven, lies and/or fabrications. Aḥmad ibn Ḥanbal collected about 40,000 *ḥadīths*, choosing to retain 40,000 from among 700,000; Muslim collected 300,000 *ḥadīths* and only accepted 4000 of them, refusing the remaining 296,000. In each case, 99% of the *ḥadīths* examined were discarded.

[35] The Shāfiʿite jurist and hadith scholar Yaḥyā ibn Sharaf al-Nawawi (1233–1277) stated that "a number of scholars discovered many hadiths" in the two most authentic hadith collection *Ṣaḥīḥ al-Bukhārī* and *Ṣaḥīḥ Muslim* "which do not fulfil the conditions of verification assumed by these men".

[36] Early scholars appeared to have been content with quoting previous jurists with virtually no mention of Muḥammad**.** The recourse to authority gradually extended backwards in time to rely on people from earlier and earlier times.

[37] In the earliest of the *ḥadīth* collections, such as the *Muwaṭṭa'* of Imām Mālik, the number of traditions associated with the Prophet are greatly outnumbered by those associated with the Companions and the Successors. The *Kitāb al-Āthār* of Abū Yūsuf (731-798) contains 189 traditions from the Prophet, 372 from Companions, and 549 from Successors.

In this unit the educator can introduce the student to the methods of classical *ḥadīth* collection – from the *musnad* collections that group *aḥādīth* according to the name of the first transmitter, to the *muṣannaf* collections that categorise them according to subject matter – through to their evaluation mechanisms. The categories of evaluation can be introduced in outline, starting from the preliminary tests of linguistic examination to detect anomalous interpretation, to contextual delimitation to detect any anomalous application of an exception (*takhṣīṣ*), or the possibility of formal abrogation (*naskh*) of one *ḥadīth* by another as a result of changing circumstances.[38] Above all, the educator can illustrate the *isnād* (chain of narration) verification system designed to establish which *aḥādīth* fall under which of the various categories – from *ṣaḥīḥ* (authentic) to *mawḍū'* (fabricated) – depending on the quality and consistency of the chain of narrators.

Since this is a somewhat complex endeavour, the system is perhaps more easily demonstrated in tabular form. The primary rank of textual authority is as follows:

The divine will as relayed through:	**The classification of the ḥadīth:**
The *Qur'ān*	*Qudsī* ('sacred')
The *ḥadīth* of the Prophet	*Marfū'* ('elevated')
The words of a Companion	*Mawqūf* ('stopped')
The words of a Successor	*Maqṭū'* ('severed')
The words of a Successor's Successor	↑
The *ḥadīth* related by a Reporter	
The *ḥadīth* related by a Collector	
(e.g. al-Bukhārī or Muslim)	

Following this first rank of authority the veracity is gradated according to the following progressively weakening criteria:

1. **The links of the *isnād*** (how far the links are interrupted or uninterrupted):

   supported (مسند); *hurried* (مرسل); continuous (متصل); *broken* (منقطع); *perplexing* (معضل); *hanging* (معلق)[39]

2. **The number of narrators** involved in each stage:

   A *consecutive series* (متواتر); *isolated* (آحاد) of which the report may be *famous* (مشهور); *strong* (عزيز); or *strange* (غريب)[40]

3. **The nature of the text**:

   An *addition by a reliable narrator* (زيادة ثقة); *denounced* (منكر); *interpolated* (مدرج)[41]

[38] Examples of *naskh* of *ḥadīth* are the abrogation of early doctrines of *nikāḥ mut'a* ('pleasure' i.e. temporary) marriage, and the progressive prohibition of wine, which had been discouraged by an early Qur'ānic verse, then condemned, and finally prohibited.

[39] Ḥadīth scholars categorised the quality of the links as: *musnad* ('supported' by a chain of traditionalists up to the level of a direct report from the Prophet); *mursal* ('hurried' if there is a missing link between a Companion and the Prophet); *muttaṣil* (a 'continuous' and uninterrupted *isnād* up to the level of a Companion or Successor); *munqaṭi'* ('broken' whereby there is a missing link in the chain up to the level of a Successor); *mu'ḍal* ('perplexing', in that two or more expected consecutive links are missing); *mu'allaq* ('hanging' in that the tradition is unsupported by an *isnād* altogether as in simply a direct 'quotation' from the Prophet).

[40] The *mutawātir* reports are part of a 'consecutive' list of multiple reports, the size of which militates against its being falsified; *āḥād* ('isolated', that is, less than a multiple *mutawātir*, and ranging from *mashhūr* ('famous' - more than two links but not multiple), *'azīz* ('strong' – with only two links at one stage in the chain reporting it) and *gharīb* ('strange' – with only one link at one stage in the chain reporting it).

4. **The reliability and memory of the narrators**:

   Sound (صحيح); good (حسن); weak (ضعيف); fabricated (موضوع) [42]

A logical extension of the intensified importance of the individual's capacity and intentions in relating a *ḥadīth* was the establishment of the closely related disciplines of *rijāl al-ḥadīth* (biographies of the *ḥadīth* narrators) and *'ilm al-jarḥ wal-ta'dīl*[43] ('disqualification and accreditation'), evaluation exercises in which the moral probity and intellectual capacity of the narrators was the focus of study.

C1.2.2 - Historical and contemporary critique on the isnād system

Having outlined the classical system of ḥadīth scholarship, in unit *C1.2.2* the educator can introduce the student to the contours of contemporary critique on the reliability and usefulness of this scholarship. There continue to be at times dramatic differences of opinion on 'what actually happened' in early Islamic history and how this is reflected (or not reflected) in the body of the *ḥadīth*, even the 'sound' *ḥadīth*. Although the modern controversy began with the studies by Orientalists with the application of techniques of modern literary and historical analysis, Muslim scholars as early as Ibn Quṭayba (828/213 – 889/276) equally cast a critical eye on the corpus and the methodologies of *isnād* scholarship.[44]

The groundbreaking works of Ignaz Goldziher,[45] Joseph Schacht[46] and Gautier Juynboll[47] introduced scepticism as to how much of the *ḥadīth* texts were genuine recollections or how much were reverse-engineered and back-dated fictitiously, to try to gain more and more authority until they eventually reached Muḥammad**,** with the result that the fuller the *isnād*, the later the *ḥadīth* is in date. Since these critical works of modern scholarship, evaluation of the sources has expanded considerably towards a more nuanced approach in which the rigour of the Muslim *muḥaddithūn* has been in some cases more positively reassessed.[48] Nevertheless, the broad findings of this modern scholarship have cast a refreshing and productive eye on the corpus of *ḥadīth* scholarship, and call for serious re-evaluation of the *isnād* methodology.

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[41] Here the *content* of the *ḥadīth* is introduced into the validation process; in the case of a *munkar* ('repudiated') *ḥadīth* the narrated text by a weak narrator is held to contradict a related authenticated *ḥadīth*; with a *mudraj* ('interpolated') *ḥadīth* the text of the narration is deemed to have been added to by the narrator reporting it.

[42] A *ḥadīth* that does not benefit from the status of being *mutawātir* (reported identically by many) is judged *ṣaḥīḥ* ('sound') if the reporters are deemed trustworthy, religiously sound and conscientiously verbatim in their wording of the report. Failing a verbatim text, a *ḥadīth* that is *ḥasan* is one whose source is known and the sense unambiguous. In the category of *ḥadīth* whose authority is called into question lie those that are *ḍa'īf* ('weak') due to some of the discontinuities in the chain listed in category 1) above (*munqaṭi' – mu'ḍal – mu'allaq*) or due to some character defects in one of the narrators, and those that are outright *mawḍū'* ('fabricated') for their being at odds with the generality of the *ḥadīth*, or from clear mistakes in the text as to events and chronology.

[43] 'The scholarship of *jarḥ* and *ta'dīl*': the term *jarḥ* refers to finding a deficiency in the narrator's righteousness or accurateness, or both (which would prejudice the validity of his reported *ḥadīth*); the term *ta'dīl* refers to a positive evaluation of his righteousness or accurateness (which would support the authenticity, and hence authority of his reported *ḥadīth*).

[44] In his work: تأويل مختلف الحديث ('*The Interpretation of Conflicting Narrations*') Ibn Quṭayba dismissed *isnād* research as irrelevant, compared to philological analysis of the texts. See G. Lecomte: *Le Traite des divergences du hadith d'Ibn Qutayba*, Études arabes, médiévales et modernes, Publications de l'Institut français du Proche-Orient, Institut français de Damas, 1962.

[45] For an Arabic translation of his groundbreaking *Introduction to Islamic Theology and Law* see in the *Almuslih* library: I. Goldziher, تاريخ التطور العقدي والتشريعي في الدين الإسلامي 2nd Ed. Dār al-Kutub al-Hadītha, Cairo, Baghdad.

[46] See, in the Almuslih library: J. Schacht, *The Origins of Muhammadan Jurisprudence*. Oxford, UK: Clarendon Press, 1950. For an Arabic translation of t work see in the *Almuslih* library: J. Schacht, اصول الفقه Dār al-Kutub al-Lubnānī, Beirut, 1981.

[47] See in the *Almuslih* library: G. Juynboll, *Muslim Tradition, Studies in chronology, provenance and authorship of early ḥadīth,* Cambridge Studies in Islamic Civilization, Cambridge University Press, 1983.

[48] See, in the *Almuslih* library: H. Motzki, *Dating Muslim Traditions: A Survey*, Arabica LII,2 (Brill, Leiden) 2005 where the author shows that the transmission of *aḥādīth* as recorded in their *isnād* may be more secure than hitherto believed. For a comprehensive evaluation of the current state of *ḥadīth* and *maghāzī* research see (in the *Almuslih* library): H. Motzki, *Analysing Muslim Traditions, Studies in Legal, Exegetical and Maghāzī Hadīth*. Brill, Leiden and Boston, 2010.

➢ *DISCUSSION POINT - The role of trust in the calibration of ḥadīth*

In the light of the importance of *ḥadīth* veracity in guaranteeing the validity of the law that is built upon them, the educator may highlight some fundamental points of discussion on the theory of authority, since this will impact upon later parts of the Curriculum on the tussle between historical/religious authenticity and the contemporary world. These are:

a) the problem of the inverse relationship of the late date of the *isnād* chains and the fullness of their documentation[49] and the implications of this for the reliability of the evaluation process;

b) the focus on genealogical preoccupations, and their relation to the personality of the narrator as a measure of reliability: are the good intentions, nobility of lineage or conviction of the narrator sufficient guarantees of the soundness of an individual's faculty of memory, in view of the up to 200 year gap from the source event? In the field of contemporary law, for instance, research into testimony – even of eyewitnesses – has convinced modern courts to place such evidence at the lowest level and view it as unreliable;

c) the conceptual starting point of *isnād* analysis; is the assumption that the rigour and mental capacities of an earlier narrator are to be held superior to that of a latter narrator a sound assumption?

d) the statistical prioritisation of the personality of the narrator over the *matn* ('content') of the narration, with the result that *isnād* rather than content effectively becomes the definition of truth and thus of legal authority.[50] What are the possible implications of this prioritisation today if the force of canonical authority demands that any contradiction in the *matn* to reason, logic and common sense, or any clear conflict with universal ethical values and principles, are to be resolved in favour of the *ḥadīth* as long as the *isnād* of these *ḥadīth* are deemed *ṣaḥīḥ*?

Moreover, despite the strenous and conscientious efforts of scholars over the centuries to establish consistent methodologies for assessing the veracity of *ḥadīth* via their *isnād*, it is difficult to find today two *ḥadīth* scholars that agree on everything. The corpus is not established, or indeed establishable in this way.

C1.2.3 - A renewed approach to ḥadīth verification - isnād cum matn analysis

The educator, in unit *C.1.2.3*, can here usefully introduce the ongoing debates by scholars on applying a more consistent focus on the *matn* of a *ḥadīth* to explain ambiguities in the *isnād*. While historically the possibility of criticizing the content as well as the *isnād* was recognized in theory, the option was seldom systematically exercised.[51] This omission has been the subject of much criticism among scholars, Muslim and non-Muslim alike.[52] In the recent period, however,

[49] During Muhammad's lifetime and after his death, *ḥadīth*s were usually quoted by his Companions and contemporaries and were not prefaced by *isnād*s; only after a generation or two (*c.* ad 700) did the *isnād* appear to enhance the weight of its text. The issue of later/fuller *isnāds* is still debated. Cf. see in the *Almuslih* library: H. Motzki: *Analysing Muslim Traditions, Studies in Legal, Exegetical and Maghāzī Ḥadīth*, Brill, Leiden and Boston, 2010, p.450.

[50] 'Abd al-Raḥmān al-Awzā'ī (ob. 157/774) expressed this definition succinctly: "The disappearance of knowledge in reality is nothing more than the disappearance of the *isnād*" (*Ṭabaqāt Ibn Sa'd*, 3/12). Similarly Shu'ba ibn al-Ḥajjāj (ob. 160/777) maintained that "the authenticity of a *ḥadīth* is only known by the authenticity of its *isnād*" (*al-Tamhīd*, 1/57 and *Sharḥ 'Ilal al-Tirmidhī* 1/360).

[51] Jonathan Brown argues that early critics disguised their *matn* criticism by using the language of *isnād* criticism (J. Brown, 'How We Know Early Ḥadīth Critics Did Matn Criticism and Why It's So Hard to Find', *Islamic Law and Society* 15 (2008) pp.143-184).

[52] Israr Khan notes that "textual conflicts among reports arise when certain reports concerning the same matter vary in words and meaning. Scholars generally suggest that such differences in reporting result not from narrating errors but because the Prophet made the statements differently on different occasions. Another reason is the claim of 'delusion' of reliable narrators … Rather than examine the text as a possible source of defect, Hadith commentators blame a narrator" (I. Khan, *Authentication of Hadith: Redefining the Criteria*, International Institute of Islamic Thought, 2012, pp.2-3). Joseph Schacht observed that "the criticism of traditions as practised by Muhammadan scholars was almost invariably restricted to a purely formal criticism of *isnāds*" (J. Schacht, *The Origins of Muhammadan Jurisprudence*, O.U.P, 1950, p.3). Ignaz Goldziher's criticism was particularly trenchant on this omission: "It is mainly formal points which are decisive for judgment about credibility and authenticity … judgment of the value of the contents depends on the judgment of the correctness of the *isnād.* If the *isnād* to which an impossible sentence full of inner and outer contradictions is appended withstands the scrutiny of this formal criticism, if the continuity of the entirely trustworthy authors cited in them is complete and if the possibility of their personal communication is established, the tradition is accepted as worthy of credit. Nobody is allowed

the discussion has been energised to produce what is termed a new discipline, an *'isnād cum matn'* analysis for the verification of *ḥadīth*. Since the content of a report can be found exhibiting both similarities and differences in one and the same report, the *isnād cum matn* analysis investigates both of these elements, starting from the sources in which the transmissions are found and proceeding backwards, focusing on the calibration of the clarity of the text and whether the variants in the content correlate with the chains of narration. The argument is that a combined approach like this can lead to more reliable results than the investigation of *isnāds* or *matns* alone.[53] Encouraging students to broaden their research spectrum like this has the potential to train a future generation of scholars capable of bringing new critical skills to this core task.

to say: 'because the *matn* contains a logical or historical absurdity I doubt the correctness of the *isnād'* … Muslim critics have no feeling for even the crudest anachronisms provided that the *isnād* is correct." He argues also that, failing a resolution of *ḥadīths* with contradictory texts, a historiographically crude and arbitrary preference is given to an affirmation of an event or quote: انما يؤخذ بشهادة المثبت لا بشهادة النافي ["the testimony that affirms, not one that denies, is to be adopted"] (I. Goldziher, *Muslim Studies (Muhammedanische Studien)*, tr. C. Barber and S. Stern, Aldine, Atherton, Vol. II, 1971, pp.140-141).

[53] The problem nevertheless remains of the reliability of each element of the comparative analysis: that is, the reliability of the dating of the sources to be compared, the reliability of the soundness of the human recollection, the varying quality of the common links that are being mapped for a statistical analysis, and the varying ways in which knowledge was transmitted in the first two centuries of Islam. A useful summary of the debate is in H. Motzki: *Dating Muslim Traditions: A Survey*, Arabica LII,2 (Brill, Leiden) 2005 in the *Almuslih* library.

COURSE C2 - THE LEGAL METHOD

Module C2.1 – THE *UṢŪL AL-FIQH*

C2.1.1 - Defining the roots of Law

The educator can usefully preface his discussion with the students on the system of Islamic Law with a broad definition in unit *C2.1.1* of how legal scholars sought to apply the source materials for that law to the lived experience of Muslims. In this respect the revolution of Islam – its defining of a new system detached in progressively greater degree from the cradles of Persian and Roman legal thought and local and tribal *'urf* – demanded an equivalent revolution in legal thinking.

As demonstrated earlier, al-Shāfiʿī was instrumental in consolidating the emerging disciplines establishing the 'roots' or 'fundaments' of law – the *uṣūl al-fiqh* – that had progressively emerged as methods to calm the great sectarian and legal disagreements which had arisen during the first two centuries of Islam. The task was to do this in such a way that would ensure fidelity to the basic ethos of the new faith. These *uṣūl* encapsulated a body of principles and investigative methodologies through which practical legal rules could be developed from the fundaments and they included, alongside the establishment of rulings, theoretical discussions of the proper nature of the religious law. In this respect the jurisprudents were ideally to be constantly engaged in expounding religious principles and their relationship to reason and ethics as part of the adjudication process.

These principles were defined primarily by the text of the Qur'ānic Revelation and the Sunna of the Prophet as expressed in his sayings, actions, or tacit approval. Subordinate to these were elements of authority beyond scripture, such as the consensus (*ijmā'*) of all Muslim interpretive scholars in a specific age on a legal rule about an issue not covered in the *Qur'ān* or the Sunna, or, failing this, a scholar's analogical analysis (*qiyās*), that is, the extension by legal reasoning of an existing principle. This four-fold system *Qur'ān – Sunna – Ijmā' - Qiyās* is generally referred to when speaking of the sources of Islamic law, with the related interpretive and hermeneutic principles (detailed below) subsumed under these fundaments. The various schools of thought that developed over time are in broad agreement on these principles, but vary in the relative importance or prioritisation of them (see *below Unit C3.1.2 - Complexions of the schools on uṣūl al-fiqh*).[54]

C2.1.2 - Between the obligatory and the prohibited (al-aḥkām al-khamsa)

As a preliminary to introducing the interpretative techniques in the *uṣūl al-fiqh*, the educator in unit *C2.1.2* can outline the overarching framework of these *uṣūl*. These are the commands and prohibitions and the degrees of rulings (*aḥkām*) that cover the spectrum between what is permissible and what is prohibited. This is because Islamic law assumes a fixed framework in which human activity is to be regulated, both in terms of the performance of the intrinsic religious obligations ('*ibādāt*) in the fulfilment of ritual purity, prayer, alms, fasting, pilgrimage, and *jihād*, and in the 'applied' observation of the Islamic perspective in social dealings (*al-mu'āmalāt*) that include matters related to the family, law and order, and commerce.

An important feature of the spectrum that the educator can highlight, and one that distinguishes the character of Islamic law, is that in contradistinction to civil and common law systems the categories of infraction of rights (*ḥuqūq*) includes infractions against *the rights of the Creator* (*ḥuqūq Allāh*), in which the borderlines or deliminations (*ḥudūd*) of the fixed framework are transgressed. These infractions therefore include crimes of *thought* (heresy and apostasy) as well as crimes against social and economic order (*ḥuqūq al-insān*).

[54] Twelver Shīʿa jurisprudence traditionally did not accord legitimacy to the use of qiyās, but relied more on reason ('*aql*) in its place.

Since the Qur'ānic text is often ambiguous or lacks explicit detail on commands and prohibitions,[55] the educator can outline how the jurisprudents attempted to navigate the territory between the two poles of the obligatory and the prohibited by gradating the spectrum according to the 'five rulings' or 'values' *(al-aḥkām al-khamsa):* 'obligatory' (*wājib, farḍ*); 'commendable' (*mandūb*); 'neutral' (*mubāḥ*); 'objectionable' (*makrūh*); 'forbidden' (*ḥarām*). It is only the two extremes, namely the *wājib* and *ḥarām*, which incorporate legal sanction. The rest are shades of values between these two extremes, all of them primarily religious in character, and largely non-legal and non-justiciable in a court of law.

- *DISCUSSION POINT - The problem of a revealed religious law and human arbitration*

  The application of a law defined by an otherwordly, revealed Text to mundane human experience has historically thrown up a number of problems for the jurisprudents, which the educator can fruitfully highlight to engage the students in a productive debate. These problems include:

  a) *Can prohibitions be conditional upon rational explanation?*

     The explicit (*ṣarīḥ*) commands and prohibitions of the Qur'ān require total obedience without any allowance for individual circumstances and regardless as to whether they are found to be rational or not.[56] The question therefore arises as to whether one should adopt a literal approach to the enforcement of commands and prohibitions, or allow considerations of rationality to play a part in the decision. On what grounds can the case for either position be made and justified?

  b) *Can a divine ruling be overridden?*

     The Qur'ān does not specify the precise value or rigour of its injunctions, and leaves open the possibility that a command may sometimes imply an obligation, sometimes a recommendation or a mere permissibility.[57] This implies the possibility that something prohibited may be interpreted as merely reprehensible (*makrūh*) or *vice versa*. Similarly, something considered commendable (*mandūb*) can also be re-interpreted as obligatory. What are the criteria for this? Do assumptions based upon the lack of specificity in the Qur'ān, or generic texts speaking of 'the bounty of God in respect of 'things that are created for their benefit',[58] constitute a true criterion? If the criteria are the pragmatic interests of the community which are subject to changes not envisaged at the time of the Revelation, what is the purpose of a law based on a Revelation from the divinity if, in the final analysis, humans are deciding for themselves what is, or what is not, useful or practicable?[59]

  c) *Is this unresolved question hindering contemporary fiqh thought?*

     The following question is therefore posed: in civil or common or law systems the revision of a law is a procedural matter that has no implications for the legitimacy or authority as such of the legal system. Can this be the case for a religious law? Is the fear of calling into question the legitimacy of *fiqh* to express the Creator's purposes a contributing factor in the difficulties encountered today in updating Shari'a law for the contemporary environment?

[55] "The question as to whether a particular injunction in the Qur'an amounts to a binding command or to a mere recommendation or even permissibility cannot always be determined from the words and sentences of its text" (M. H. Kamali, *Principles of Islamic Jurisprudence*, The Islamic Texts Society, Cambridge 2005, *online text* p.39).

[56] This is because "it is in the essence of devotion (*'ibāda*) that obedience does not depend on the rationality or otherwise of an injunction". Kamali, *op cit*, *online text* p.137.

[57] Kamali, *op cit*, *online text* p.40.

[58] Kamali, *op cit*, *online text* p.39.

[59] The commonly referenced authorisation for this is the legal maxim: الضرورات تبيح المحظورات ('necessities overrule prohibitions') which is founded on texts such as Qur'ān V (*al-Mā'ida*), 3: فَمَنِ اضْطُرَّ فِي مَخْمَصَةٍ غَيْرَ مُتَجَانِفٍ لِإِثْمٍ فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ *Whoever is compelled by hunger, not inclining willfully to sin, then surely Allah is Forgiving, Merciful.*

C2.1.3 - The scriptural source: lexical matters

The problem of the lack of legal content and clarity in the Qur'ānic text challenged the energies of the legal theorists onto deeper examination of the law-bearing texts that could be identified. The educator in unit *C2.1.3* can introduce the student to the lexical investigation of the text that the jurisprudents included under *uṣūl al-fiqh*, on their understanding that the strength of a legal rule was to a large extent determined by the language in which it is was communicated. He can outline the nuanced subdivisions and implications of words according to their ranks of clarity[60] and obscurity[61] and the implications these hold for the derivation of legislation.

The unique status of the Qur'ānic text as the *word and fabric* of the divine utterance (as opposed to the status of the Jewish and Christian scriptures as the divinely *inspired* teaching or guidance) obligated the legal theorists to pay close attention to the meaning of individual words and phrases, in addition to the overall sense of the divine message. The educator can illustrate this focus in the categorisation by the *fuqahā'* of meanings as 'explicit' *('ibārat al-naṣṣ),* 'alluded to' *(ishārat al-naṣṣ),* 'inferred' *(dalālat al-naṣṣ)*[62] or 'required' (*iqtiḍā' al-naṣṣ)* for reasons of sense, and their further division of words into those whose meanings are absolute (*muṭlaq*) or qualified (*muqayyad*), with the rulings based on them accordingly precise, or limited as to their application.

The meaning of the Text, therefore, is subject to interpretation. The educator can introduce the student to the two forms of this interpretation: *tafsīr* ('explanation') – which deduces rulings by explaining the content and linguistic composition of the text, and *ta'wīl* ('allegorical interpretation') – which goes beyond the literal meaning of words and sentences and distinguishes in them a hidden meaning. Much of the focus of the first of these forms of interpetation – *tafsīr* – is upon distinguishing statements that are specific from those that are of general import. Here an understanding of the *context* of a revealed text, and the *purpose* of a revealed text, comes into play. The educator can here introduce the categories of (*khāṣṣ*) ('specific') and *ʿāmm* ('general') that determine, for instance, whether the text conveys an actual prohibition (*taḥrīm*), or merely an expression of reprehension (*karāha*).

Given the overall 'generic tones' of the Qur'ān in matters of rulings, as mentioned earlier, the task of the jurist was to pin down where possible the specific implication of a text by seeking elements that 'particularize' (*tukhaṣṣīṣ*) it. Once this was done, decisive (*qaṭ'ī*) rulings could satisfyingly be established which could accumulatively form the core of the Sharī'a. The remaining generic rulings in the Qur'ānic text which cannot be effectively subjected to the *takhṣīṣ* process can now function in their own right as justification for interpretive versatility – allowing legal scholars and theorists to extract fresh lessons and principles in step with the changing realities of era and place.[63] Understandably it is the second form of interpretation – *ta'wīl* – that more intensively exercised the minds of legal scholars over the centuries, since its departure from the manifest meaning of the text demands a level of speculative reasoning. To prevent anarchy in this form of interpretation and to obviate opposition,[64] rules were set down

[60] The ranks of clarity from weakest to strongest are: *ẓāhir* ('manifest', 'apparent')– with a meaning not in harmony with the context in which it occurs – subject to abrogation); *naṣṣ* ('explicit) – clear meaning in harmony with its context – a definitive text or ruling); *mufassar* ('unequivocal ') thus in harmony with the context in which it appears; *mufassar bi-ghayrih* 'clarified by another context where it appears'; *muḥkam* ('perspicuous') which cannot be abrogated, not even in the lifetime of the Prophet). See Kamali, *op cit*, *online text* pp.89-95.

[61] Unclear words are gradated as the following: *khafī* ('obscure') with a basic meaning but partially ambiguous in some of the cases to which it is applied; *mushkil* ('ambiguous') requiring research to explain its use in a specific context; *mujmal* ('ambivalent') inherently unclear and giving no indication as to its precise meaning; *mutashābih* ('intricate') with a meaning that is entirely mysterious. See Kamali, *op cit*, *online text* pp.97-101.

[62] That is, a meaning warranted by the logical and juridical purport of the text. A further category, an advanced form of inferred meaning, is one that was classed as *mafhūm al-mukhālafa* ('implied converse meaning' or 'contrary implication' to the actual text) which remains controversial among the Ḥanafīs.

[63] Kamali, *op cit*, *online text* p.38.

[64] The relatively short-lived Ẓāhirī literalist school, for instance, banned *ta'wīl* outright.

licensing how far it could be taken and methodologies for determining to what degree words or phrases were to be taken in a literal (*ḥaqīqī*) or metaphorical (*majāzī*) sense.[65]

- *DISCUSSION POINT - Divine communication and Arabic grammar*

  A useful debate for the educator to develop for the students is the relationship between language and Revelation, and the influence of this relationship on the development of legal thought. While grammatical analysis is not an integral part of the law or the Islamic faith, it was nevertheless considered instrumental as an aid to the correct understanding of the Sharīʿa.[66] What were the implications of this linguistic focus? For Mohamed Arkoun the result was a 'logocentric enclosure' rooted in a preoccupation of the *aṣl*, the 'root', or original foundation of thought, the inaugural lexical moment that must be endlessly consulted to verify the legitimacy of any human endeavour and of the discourse that expresses it. This enclosure defines the parameters of Islamic legal thought,[67] but its focus on the lexical *aṣl* presupposes an Arabic linguistic endeavour. Correct usage of the grammatical and lexical rules of Arabic was deemed sufficient to ensure the permanent validity of the meanings, and it is this preoccupation that accounts for the obligatory 'linguistic' introductions to works of *uṣūl al-fiqh*. These logocentric instincts led ultimately onto *i'jāz al-Qur'ān* doctrines of lexical perfection and immutability, as a logical corollary of the divine revelation, and in turn an evidence of it.[68] For discussion and debate, the educator can thus pose the following questions:

  - Does this association between the linguistic fabric of the Text and religious truth shortcut the relationship with truth that would otherwise be exclusively associated with the content? Is the *mujtahid*, in Arkoun's words, "misleading himself and the faithful by perceiving reality exclusively through the prism of the literal meaning of a Text"?
  - Do these linguistic preoccupations delimit the universality of the Revelation, and the universality of its legal rulings in environments diverse in time and place from the inaugural lexical moment?
  - Does the *Arabness* of the *aṣl* underpinning legal thought constitute a diversion from global reality, and does this have an inhibiting effect on the application of Islamic law to the contemporary world?

C2.1.4 - The scriptural status of the Sunna

The educator may introduce here an interesting arena of discussion on the status of the prophetic *ḥadīth*. Since whatever material for rulings that existed in the Qur'ān was expressed in brief and general terms, there was much need for the *takhṣīṣ* process mentioned above. A unique relationship was thus forged between the *sunna* of the Prophet and the Qur'ānic text, so that the two became in many cases integral to one another.[69] And, as we have seen, al-Shāfiʿī is associated with championing the raising of the authority of the *ḥadīth* to the rank of the Qur'ānic revelation itself. This was more than a rhetorical statement; according to the Ashʿarīs, the Muʿtazila, Ibn Ḥazm al-Ẓāhirī and some Ḥanbalī and Shāfiʿī scholars, the Qur'ān provides clear

[65] The rules aimed at removing the influence of inclination or personal opinion, isolating out outlandish interpretations and ensuring that exercises in *ta'wīl* were not to be applied to Qur'ānic words or passages that were classed as *mufassar* (unequivocal) or *muḥkam* (perspicuous), in conformity with the Qur'ānic passage مِنْهُ آيَاتٌ مُحْكَمَاتٌ هُنَّ أُمُّ الْكِتَابِ وَأُخَرُ مُتَشَابِهَاتٌ *Some of its verses are decisive, they are the basis of the Book, and others are allegorical* (Qur'ān III *(Āl 'Imrān),* 7).

[66] Kamali, *op cit, online text* p.84.

[67] This enclosure was signalled by al-Ghazālī's prescription: فهو المتبع دون أقوال العباد ("that is what is to be followed, to the exclusion of the utterances of creatures") *Al-Muṣtaṣfā fī 'Ilm al-Uṣūl,* II, 122.

[68] "Any attempt to know the truth (*al-ḥaqq*) therefore consists in practice of total submission (*taqlīd*) to the authority of the Qur'ānic text whose linguistic pre-eminence is inevitably confounded with the transcendence of God's will." See Mohamed Arkoun, *The Unthought in Contemporary Islamic Thought,* Saqi Books, London 2002, pp.174-5.

[69] Kamali, *op cit, online text* p.38.

evidence that every speech of the Prophet partakes in the status of revelation (*waḥy*) on the basis of the Qur'ānic text: *He says nothing of his own desire, it is nothing other than revelation* (waḥy*) revealed.*[70]

As a consequence, there came to be ascribed to these *ḥadīth* all the properties and functions of the *muṣḥaf*: a *ḥadīth* could abrogate another *ḥadīth*, and indeed a *ḥadīth* could abrogate part of the Qur'ān itself.[71]

The potential theological implications were skirted by scholars who argued that since the Prophet had been uniquely granted by God the status of representing God's will by his actions, or *sunna*, there is no abrogation of a divine will by a human that is actually taking place. For the abrogation, in reality, comes from Allah Himself, whether the abrogating passage is found in the Qur'ān or in the *Sunna*.[72] Moreover, in the celebrated statement attributed to the early theorist al-Awzāʿī' (ob. 157/774): "the Book is in greater need of the *Sunna* than the *Sunna* is of the Book".[73]

The ḥadīth as scripture: a muṣḥaf-like page from the Ṣaḥīḥ al-Bukhārī with gold illumination [74]

The issue of one source validating the other came to be bitterly disputed. *Aḥādīth* that supported the primacy of the Qur'ānic text over the *ḥadīth* and the *sunna* were rejected,[75] and countered with a report of the Prophet saying: "Convey from me, even if it is one verse", indicating for the scholars that the Sunna may also be described as 'verses'.[76] As the *ḥadīth* collections came to take priority in hermeneutics, al-Shāfiʿī's position that "the Prophet's command is Allah's

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[70] Qur'ān LIII *(al-Najm)* 3-4.

[71] Al-Shāfiʿī gives examples of abrogation of a Qur'ānic verse (in the form of a *takhṣīṣ*). For example, the Qur'ānic verse *'As for the thief, male and female, cut of their hands as a retribution from Allah,'* (V:42) is subsequently qualified by the *hadith* which reads 'Hands should [neither be] cut off [for the stealing] of fruits, nor the spadix of a palm tree, and that the hand [of the thief] should not be cut off unless the price of the [thing] stolen is a quarter of a dinar or more.' M. Khadduri (tr.), *Al-Shāfiʿī's Risāla, Treatise on the Foundations of Islamic Jurisprudence,* Islamic Texts Society, (reprint of 1961 edition), p.105.

[72] "The Blessed Prophet's own sunnas do not in reality abrogate anything themselves; they only state that Allah has cancelled the ruling of a Qur'ānic *āya*. Hence the abrogation, in reality, is from Allah, whether the abrogating passage is in the Qur'ān or the Sunna.' (Imām Abū al-Walīd al-Bājī (d. 474), *Iḥkām al-Fuṣūl ilā `Ilm al-Uṣūl*, ed. A. Turki (Beirut, 1986/1407), §435 (p.427). لا ينسخ بسنته شيئا في الحقيقة, وإنما يبين بسنته أن الله قد أزال حكم الآية. فالنسخ على الحقيقة مضاف إلى الله تعالى سواء كان النسخ بالقرآن أو بالسنة

[73] This is recorded as deriving from the *Ṭabi'ī* Makḥūl according to Ibn Mufliḥ al-Ḥanbalī in الآداب الشرعية. The argument is also recorded as: السنة قاضية على الكتاب وليس الكتاب قاضيا على السنة ('*The Sunna is an adjudicator of the Book, not the Book of the Sunna'*), making the case that "the authenticity and independence of the pure Sunnah through legislation of rulings is a religious necessity, and only those who have no portion in the religion of Islam will gainsay this". أن ثبوت حجية السنة المطهرة واستقلالها بتشريع الأحكام ضرورة دينية ولا يخالف في ذلك إلا من لا حظ له في دين الإسلام . See Ibn ʿAbd al-Birr,إرشاد الفحول الي تحقيق الحق من علم الأصول , Part 1, p.69. الكتاب أحوج إلى السنَّة من السنَّة إلى الكتاب

[74] The passages calligraphically inscribed are *Ḥadīths* 815 and 816 from chapter كتاب الأذان : "*The Prophet was ordered to prostrate on seven bony parts and not to tuck up his clothes or hair"* (when performing *ṣalāh*). Unknown artist, Shiraz, dated 1400-1450. From the Keir Collection of Islamic Art, Object number K.1.2014.800.1.

[75] Such as the *ḥadīth*: "Whatever comes to you from me, check it against the Book of Allah; if it is in accordance with the Book of Allah, then I said it, but if it goes against it, then I did not say it." This was deemed a fabrication associated with the Khawārij. ما أتاكم عني فاعرضوه على كتاب الله , فإن وافق كتاب الله فأنا قلته , وإن خالف فلم أقله

[76] See al-Zarkashi, *Al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh,* (ed .U. al-Ashqar) Vol. 4, Kuwait 1409/1988, p.165. وقال ابن حبان في " صحيحه " في قوله صلى الله عليه وسلم : (بلغوا عني ولو آية) : فيه دلالة على أن السنَّة يقال فيها : آي .

command" became established, with the inexorable consequence that a doctrine of *Sunna* infallibility developed which came close to being applied to the person of the Prophet.[77]

The educator can here introduce the student to the conundrum, discussed at length by the Muslim scholars and theorists, of an effectively infallible Prophet, as defined by his *ḥadīth* and *sunna*, being apparently contradicted by Qur'ānic evidence indicating his fallibility. In answering this conundrum the scholars needed to resolve a number of issues:

Firstly, where do the borderlines between *authoritative* and *non-authoritative* sources lie? The intrinsically uncertain body of authoritative sources (the *ḥadīth* veracity problem) and the monumental scholarly effort on *isnād* research that was initiated to resolve this, effectively assume that the *ḥadīth* do not partake of the status of Revelation. Yet this is despite the above-mentioned Qur'ānic text concerning the Prophet's words: إِنْ هُوَ إِلَّا وَحْيٌ يُوحَىٰ ('*it is nothing other than revelation revealed'* that appears to contradict this.[78]

Secondly, where do the borderlines between *revelation* and *interpretation* lie? This issue goes right to the authority of the *ḥadīth* Text. The statement of '*a revelation revealed*' implies sacralisation of the *ḥadīth*, and thus that there is no cause for an interpretation of them. Yet the majority of *'ulamā'* held that the Prophet himself was practicing *ijtihād* of the Qur'ān in issuing some of his *ḥadīth.*[79] How could a revealed text take the form of an act of *ijtihād*?

Thirdly, if it were accepted that the Prophet did practice *ijtihād*, then disagreeing with his views would be permissible. Yet opposing the Prophet is clearly forbidden, and obedience to him is stated to be a Qur'ānic duty upon every Muslim.[80]

Fourthly, the conundrum increases when it is observed that the Qur'ān gives clear indications not only that the Prophet practiced *ijtihād*, but also that he was *capable of making errors*, such as the verse: *Allah forgive thee (O Muhammad)! Wherefor didst thou grant them leave ere those who told the truth were manifest to thee and thou didst know the liars?* [81]

Lastly, the same process of sacralisation appears to have affected the discipline of *fiqh* itself. The task of determining how knowledge of the Prophet's exemplary action may be reliably gained, and how this gained knowledge may be consistently applied to legislation, was a subject of active scholarly debate. The opinions of the jurists were therefore secondary literature, yet over history the opinions of the leading jurists among them came to be recognized as principal texts in their own right.[82]

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[77] Cf the statement attributed to Imām Mālik:" Everyone after the Prophet will have his saying accepted or rejected, not so the Prophet" (Ibn 'Abd al-Barr in *Jāmi' Bayān al-'Ilm* - 2/91); and the statement of Imām Aḥmad: من رد حديث رسول الله فهو على شفا هلكة ('Whoever rejects a *ḥadīth* of Allah's Messenger is on the brink of destruction!') Ibn al-Jawzī, *Manāqib al-Imām Aḥmad ibn Ḥanbal,* (ed. M.A. al-Khānjī), Al-Saʿada Press, Cairo, p.182.

[78] Scholars attempted to resolve this conundrum by claiming that the reference here is to the Qur'ān itself, and not to every word that the Prophet uttered. See. Kamali, *op cit*, *online text* p.328.

[79] These scholars typically adduce the following *ḥadīth*: "I decide between you on the basis of my opinion (*ra'y*) in cases about which no revelation has been sent down to me." "فَقَالَ إِنِّي إِنَّمَا أَقْضِي بَيْنَكُمْ بِرَأْيِي فِيمَا لَمْ يُنْزَلْ عَلَيَّ فِيهِ" Sunan Abī Dāwūd 3585 (classified as *ḍa'īf*).

[80] Qur'ān IV (*al-Nisā'*), 14: وَمَنْ يَعْصِ اللَّهَ وَرَسُولَهُ وَيَتَعَدَّ حُدُودَهُ يُدْخِلْهُ نَارًا خَالِدًا فِيهَا وَلَهُ عَذَابٌ مُهِينٌ *And whoever disobeys Allah and His Messenger and goes beyond His limits, He will cause him to enter fire to abide in it, and he shall have a shamful chastisement*; Qur'ān IV (*al-Nisā'*), 59: يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ *O ye who believe! Obey Allah, and obey the messenger and those of you who are in authority.*

[81] Qur'ān IX (*al-Tawba*) 43. This conundrum was signalled by Muḥammad al-Shawkānī where he also flags up the Qur'ānic *āyāt* VIII (*al-Anfāl*), 67; XXXIII (*al-Aḥzāb*), 37 and the Prophet's own admission لو استقبلت من أمري ما استدبرت لما سقت الهدى أي لو عملت أولاً ما علمت ('with examples such as these, what the Prophet did does not constitute revelation'). See M. Shawkānī, إرشاد الفحول إلى تحقيق الحق من علم الأصول (ed. Abū Ḥafṣ al-Atharī), Riyadh 1421/2000, Vol. II p.1049. ومثل ذلك لا يكون فيما عمله بالوحي آخراً ما فعلت ذلك and concludes

[82] "The opinions of the jurists based on legal reasoning are subordinate texts as they are subsidiary to the secondary text. It is in Islamic cultural history that secondary text was elevated to the level of the principal. Gradually the opinions of the leading jurists in the sciences of Fiqh and Tafsir (Qur'anic exegesis) came to be recognized as Principal texts." M.K. Masud, *"Classical" Islamic Legal Theory as Ideology: Nasr Abu Zayd's Study of al-Shāfi'ī's Risāla,* n.d., p.13.

The developing legal theory was thus having to resolve some basic conundrums thrown up by the quandary of revelation, infallibility and interpretation. This meant that for each question or issue of legal theory, there was an underlying epistemological issue that related to what extent the reports of the Prophet's words and acts could act unequivocally as a source of law (*ḥujjiyya*). The nature of the debates indicated that the rulings of the *fuqahā'* were coloured by the fact that they were, to a greater or lesser extent, epistemologically compromised.[83]

- *DISCUSSION POINT – The legislative authority of the ḥadīth and sunna*

The educator can thus engage the students in a productive discussion on the following questions:

- How satisfactorily has the conundrum of prophetic fallibility and the infallible *sunna* been resolved? Is there proper validity to comments made by the *'ulamā'* that any error the Prophet might have made was rectified by the Prophet himself or through subsequent revelation?[84]
- How satisfactory is the conclusion drawn by the scholars – in the face of the uncertainty of the canon of source texts – that legal derivation could proceed with less than certain knowledge of an individual report's authenticity?[85]
- Has the sacralisation process had a positive or negative effect on legal thought, both historically and in its contemporary development?
- Has the delineation of authoritative legal source been established solidly enough to the point of placing Sharī'a law on a secure footing?

Module C2.2 – THE *UṢŪL AL-FIQH* METHODOLOGIES

In Module *C2.2.* the educator can introduce the student to the methodologies developed by the scholars in *uṣūl al-fiqh.* These methodologies seek to elucidate the meaning of the Qur'ānic and *ḥadīth* passages where the obscurities in the text render unequivocal legal derivation difficult. The methods elaborated range from textual criticism, to analogical analysis to considerations of the pragmatic implications of text-based rulings and their likely impact on the ground in the administration of justice.

C2.2.1 - The resolution of contradictions (ta'āruḍ al-adilla)

In unit *C2.2.1* the educator can demonstrate how the scholars dealt with the puzzle of *aḥādīth* appearing to conflict with each other, or even with verses of the Qur'ān, and how much of the *uṣūl al-fiqh* endeavour was developed in order to provide consistent mechanisms for resolving such conflicts. This was particularly pressing given the cogency of objections raised by the Muʿtazila school on divergences (*ikhtilāf*), contradictions (*tanāquḍ*), inconsequential statements (*takḏīb al-āḫir lil-awwal*) and statements deemed to clash with basic tenets of reason (such as anthropomorphisms). The problems were examined by recourse to assessing the textual status of the reports according to their categorisation of authority, assessing the *isnād*, and the content via a comprehensive linguistic analysis, prioritising the literal to the metaphorical meaning, the clear to the implicit meaning, and the explicit meaning to the allusive meaning.

[83] On this interesting issue, see Aron Zysow, *The Economy of Certainty, An Introduction to the Typology of Islamic Legal Theory*, Lockwood Press, 2013, p.xv.

[84] Sayyid A. Kassab, اضواء حول قضية الاجتهاد فى الشريعة الإسلامية Dār al-Tawfīq al-Namūdhajiyya, 1404/1984, p. 61. (Citation from Kamali, *op cit*, *online text* p.329).

[85] "The distinctive Ḥanafī position on these matters was to require varying the acceptable level of certainty for legal derivation depending on the content of the report". (Aron Zysow, *ibid.*)

Failing the resolution of the conflicts according to these methods, the scholar was to have recourse to the theory of abrogation (*naskh*) in its two forms: explicit (*ṣarīḥ*) – where texts openly state that an earlier ruling is being changed – or implicit (*ḍīmnī*) – in which the abrogation may be deduced due to a historically later practice indicated in the Qur'ān[86] or by the Prophet[87], or by an apparent specification of a generic ruling (*takhṣīṣ al-ʿāmm*) in view of a new context that demanded a different ruling. Failing this, analysis is to be suspended altogether and the examination of the conflicting texts abandoned.[88] The problem provoked the writing of entire books on the subject and the educator may usefully illustrate Ibn Quṭayba's defence in his famous work *Kitāb Ta'wīl Mukhtalif al-Ḥadīth* where he set out to systematically refute the objections.[89] The primary place given to this issue indicates its serious implications for the validity of legal rulings. Such contradictions could not be seen to reflect inconsistencies in the Divine Lawgiver's message and were not to extend beyond the issue of 'interpretation'.[90]

- *DISCUSSION POINT – A potential arbitrariness in analytical methods*

The student can here be encouraged to discuss the consistency and validity of these approaches.

The educator may single out some issues, such as the ambiguities we have seen on the calibration of *ḥadīth* according to the *isnād* and the issue of the assumed gradability of the retentive capacity of the reporters. A number of rules of preference on the *matn* may also be discussed, such as the prioritisation of evidence which affirms continuation of the original state over that which negates it (see *istiṣḥāb* below) or the argumentation that 'prohibition takes priority over permissibility'.[91] There is also the provision for the scholar to depart from such rules and instead apply that which brings ease in preference to the one that entails hardship.[92]

The educator may thus initiate a discussion on how robust these criteria may be considered to be, and whether, or to what extent, the textual logosphere of the raw material has generated arbitrary methodologies for determining legal authority and whether, in the final analysis, the ruling on a particular case is thus to be made on the basis of the scholar's rational moral judgement, rather than on structures determined by the text.

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[86] An example of this that exercised the scholars was the differing instructions in *sūra* II (*al-Baqara*), 234 and 240 as to the period for which widows should be maintained out of an estate. The general possibility of abrogation, of course, was given the by the Qur'ān itself at XVI (al-Naḥl), 106 and II (*al-Baqara*), 106, although some scholars disputed the exitence of abrogation or argued that any supposed abrogation was more a question of differences required due to a differing cuircumstance (*takhṣīṣ*).

[87] The oft-cited example is given in *Riyāḍ as-Ṣāliḥīn,* 580 (reported by Muslim). عن بريدة رضي الله عنه قال قال رسول الله صلى الله عليه وسلم "كنت نهيتكم عن زيارة القبور فزوروها" (رواه مسلم). ("Buraidah (May Allah be pleased with him) reported: The Messenger of Allah said, "(In the past) I forbade you from visiting graves, but visit them now.")

[88] 'Abd al-Wahhāb Khallāf: "If neither of these methods can resolve the problem, then by examining their historical date the later text is to abrogate the earlier. If knowledge of the date is not available, one must abandon the examination of them altogether." إذا تعارض النصان ظاهراً وجب البحث والاجتهاد في الجمع والتوفيق بينهما بطريق صحيح من طرق الجمع والتوفيق، فإن لم يمكن وجب البحث والاجتهاد في ترجيح أحدهما بطريق من طرق الترجيح، فإن لم يمكن هذا ولا ذاك وعلم تاريخ ورودهما كان اللاحق منهما ناسخاً للسابق، وإن لم يعلم تاريخ ورودهما توقف عن العمل بهما See ʿAbd al-Wahhāb Khallāf, علم اصول الفقه, Maktabat al-Daʿwā al-Islāmiyya, Shabāb al-Azhar, n.d. p.229.

[89] Ibn Quṭayba: تأويل مختلف الحديث ('*The Interpretation of Conflicting Narrations*'), in which in addition to employing the methods of the Muʿtazilī critics such as speculatiive reflection (*naẓar*), rational proof (*ḥujjat al-ʿaql*) and experience (*'iyān*), he uses all the tools of morphology, phonetics, syntax, rhetoric and lexicography. Interestingly, Ibn Quṭayba also makes frequent use of Jewish and Christian texts to vindicate *aḥādīth* against criticism. See G. Lecomte: *Le Traité des Divergences du Ḥadīṯ d'Ibn Qutayba*, Institut Français de Damas, Damascus 1962, pp.35-36.

[90] The implications for the faith of the believer is outlined by 'Abd al-Wahhāb Khallāf: "it is only an apparent contradiction, and one according to what appears to our minds, and therefore not a real contradiction. This is because the One Wise Lawgiver cannot issue from Himself another evidence that demands for the same circumstance a contradictory ruling at one and the same time." ومما ينبغي التنبيه له: انه لا يوجد تعارض حقيقي بين آيتين أو بين حديثين صحيحين أو بين آية وحديث صحيح، وإذا بدا تعارض بين نصين من هذه النصوص فإنما هو تعارض ظاهري فقط بحسب ما يبدو لعقولنا، وليس بتعارض حقيقي، لأن الشارع الواحد الحكيم لا يمكن أن يصدر عنه نفسه دليل آخر يقتضي في الواقعة نفسها حكماً خلافة في الوقت الواحد ʿAbd al-Wahhāb Khallāf, علم اصول الفقه, Maktabat al-Daʿwā al-Islāmiyya, Shabāb al-Azhar, n.d. p.230.

[91] See ʿAbd al-Wahhāb Khallāf, Op. cit. p.232: ومن طرق الترجيح طرق موضوعية قرروا فيها مبادئ ترجيحية عامة، مثل قولهم: إذا تعارض المحرم والمبيح، رجح المحرم. وقولهم: إذا تعارض المانع والمقتضى، قدم المانع

[92] Kamali, *op cit*, *online text* p.312.

C2.2.2 - Precedent and ijtihād

This brings the student on the issue of the authority granted the *faqīh* to engage in independent legal arbitration (*ijtihād*) – the process of inferring by probability the rules of Sharīʿa to be derived from detailed examination of the scriptural sources. The procedure is regarded as second only in legal importance to the textual evidence itself in the Qur'ān and the Sunna. Its importance derives from its being a continuous process of development, as opposed to the static nature of the revealed texts. *Ijtihād* is regarded as the principal instrument for maintaining harmony between revelation and reason, and under this overarching initiative fall all of the subordinate procedures of consensus, analogy, juristic preference and considerations of public interest that are detailed in this Module. The central role and importance of *ijtihād* was founded upon what the scholars determined as its scriptural justification,[93] as a result of which the major schools (with the exception of the Ḥanafīs) regarded the endeavour as a necessary condition of the legal scholar.[94]

The educator may also sketch the scholarly qualifications and efforts demanded of the *mujtahid* and the implications of these standards for the pragmatic administration of law. The demand for exhaustive scriptural research[95] and *fiqh* training precluded the contribution of a layman:[96] competencies were required in the Arabic language, the disciplines of *asbāb al-nuzūl* (occasions of the revelation), abrogation, the 500 or so law-bearing verses of the Qur'ān and the Sunna (*aḥādīth al-aḥkām*) along with the relevant authorizing *isnād*, the objectives (*maqāṣid*) of the Sharīʿa as well as the disciplines listed below.[97]

The educator can then outline the arenas in which *ijtihād* is permissible, that is: where proofs are not provided by Revelation – where evidence is scriptural but where the meaning is speculative – where (in the *ḥadīth)* there is doubtful authenticity but definitiveness in meaning – where both authenticity and meaning are speculative.[98] As for the arena where *ijtihād* is prohibited, these include the fundamentals of faith such as the createdness of the universe or the obligatory status of the pillars of the faith, or clear texts concerning the prescribed *ḥudūd* penalites.[99]

As for the methodology, the educator can summarise the sequence of priorities laid down by al-Shāfiʿī and al-Ghazālī: examine the *nuṣūṣ* of the Qur'ān – refer to *mutawātir* and then to *āḥād aḥādīth* – examine the manifest (*ẓāhir*) text of the Qur'ān and the possibility of *takhṣīṣ* by means of a *hadīth* and whether this be an actual (*fiʿlī*) or tacitly (*taqrīrī*) approved s*unnah* – consult the legal *madhāhib* for a consensus on a related case (*'illa*) – attempt an interpretation by analogy (*qiyās*) – apply the principle of 'original (i.e. default) absence of liability' (*al-barā'a al-*

[93] Principally the *ḥadīth* of Muʿādh ibn Jabal where the Prophet is to have asked: *"What will you do if you do not find any guidance in the Sunnah of the Messenger of Allah and in Allah's Book?" To which Mu'ād ibn Jabal replied: "I shall do my best* (ajtahid) *to form an opinion and I shall spare no effort."* "فَإِنْ لَمْ تَجِدْ فِي سُنَّةِ رَسُولِ اللَّهِ صلى الله عليه وسلم وَلاَ فِي كِتَابِ اللَّهِ " . قَالَ "أَجْتَهِدُ رَأْيِي وَلاَ آلُو" *Sunan Abī Dāwūd* 3592, classed as a *mursal ḥadīth* or *ḍa'īf* (al-Albānī). Another ḥadīth (*Sunan Abī Dāwūd* 3585) has the Prophet himself stating that "I decide between you on the basis of my opinion in cases about which no revelation has been sent down to me." " إِنِّي إِنَّمَا أَقْضِي بَيْنَكُمْ بِرَأْيِي فِيمَا لَمْ يُنْزَلْ عَلَيَّ فِيهِ " .

[94] Abū Bakr ibn Masʿūd al-Kāsānī, *The Unprecedented Analytical Arrangement of Islamic Laws*, trans. Imran A. K. Nyazee (Islamabad: Advanced Legal Studies Institute, 2007), p.21.

[95] Al-ʿĀmidī described this as "a total expenditure of effort in such a manner that the jurist feels an inability to exert himself further" استفراغ الوسع في طلب الظن بشيء من الأحكام الشرعية على وجه يحس من النفس العجز عن المزيد عليه . On this, see M. Al-Shawkānī, إرشاد الفحول إلى تحقيق الحق من علم الأصول Ed. Abū Ḥafṣ Sāmī ibn al-'Arabī, Dār al-Faḍīla, Riyādh, 1st ed. 1421/2000, Vol. 2, p.1027.

[96] See M. al-Shawkānī (*ibid*): "He must be mature and intelligent, with a demonstrative capacity to deduce rulings from their sources, which must be according to the conditions that he be knowledgeable of the texts of the Book and the Sunna, failing which he cannot conduct *ijtihād*; he is not required to know all of the Qur'ān and the Sunna, but rather what is related to them in terms of rulings" ولا بد أن يكون بالغاً عاقلاً قد ثبتت له ملكة يقتدر بها على استخراج الأحكام من مآخذها وإنما يتمكن من ذلك بشروط . الأول أن يكون عالماً بنصوص الكتاب والسنة فإن قصر في أحدهما لم يكن مجتهداً ولا يجوز له الاجتهاد ولا يشترط معرفته بجميع الكتاب والسنة بل بما يتعلق منهما بالأحكام

[97] Kamali, *op cit*, *online text* p.324. Wael al-Hallaq gives a useful list of the full requirements of the *mujtahid* as seen by the classical scholars. See W. al-Hallaq, 'Was the Gate of Ijtihad Closed?' *International Journal of Middle East Studies*, Vol. 16, No. 1 (Mar., 1984), pp.5-6.

[98] Kamali, *op cit*, *online text* p.318.

[99] See M. Al-Shawkānī (*op. cit*.), Vol. 2 p.1033: يشترط العلم بالضروريات كالعلم بوجود الرب سبحانه وصفاته وما يستحقه والتصديق بالرسل بما جاءوا به

aṣliyya)[100] – take into consideration the conflict of evidences (*taʿāruḍ al-adilla*) – resort if necessary to the categories of equitable reasoning *istiḥsān*, *maṣlaḥa mursala* and *istiṣḥāb* (see units *C2.2.5* - *C2.2.7* below) – and finally catalogue the ruling arrived at: obligatory (*wājib*), forbidden (*ḥarām*), reprehensible (*makrūh*), or recommended (*mandūb*).[101]

The relationship between ijtihād and taqlīd

The educator can engage the students with some interesting implications of the *ijtihād* process. The basic rule for the *mujtahid* in Sharī'a theory was that he was not to follow the *ijtihād* of others. The point in this was that the derivation of a ruling was meant to be organic, in that the scholar was to go back in each case to first principles, to consult the primary sources and derive an active ruling from them. This requirement, naturally, was a tall order for the average legal scholar, yet the legal theory assumed an all-encompassing knowledge to allow him to reconstruct from the ground up from the raw textual materials. As such the legal theory on *ijtihād* was more theoretical than practical: by the time of its consolidation in the late 9th century the era of the great *mujtahidīn* was already over, indicating that its purpose was to show how *fiqh* could be constructed from beginning to end.[102]

He was also bound by the results of his own *ijtihād;* the conclusion that he reached was equivalent to an extension of the divine command, which he therefore must observe. The logic for this was clear: if one ruling of *ijtihād* could be set aside by another, then the latter might equally be subject to reversal, and this would lead to uncertainty and loss of credibility in the derived rulings.[103] At a later stage in the *Curriculum* the educator can examine the comparison between this principle and the *stare decisis* ('stand by what has been decided') principle of the Common Law and Civil Law systems (see unit *C3.1.3* below).

An important element for the educator to explain is the relationship between the *mujtahid* and the *muqallid*, and how the statistical balance came to tilt in favour of the latter. Although the qualified *mujtahid fī al-shar'* was not permitted to follow an existing authoritative *madhhab*, in practice most scholars were unable to attain that level of expertise, and instead attained to the status of *mujtahid fī al-madhhab*, where his independent judgement was limited to the parameters set by his school of law. In this way, as mentioned earlier, progressively the *fuqahā'* became 'imitators' or 'reproducers' – *muqallidūn* – of these *mujtahidīn*.[104] Since *ijtihād* is a *farḍ kifāya*, a duty to be fufilled by only a limited number of qualified persons, all laymen and non-*mujtahid* jurists are under the obligation to follow the guidance of the *mujtahidīn.*The difference between the *mujtahid* and the *muqallid* thus consists of the former's claim to provide proof (*ḥujaj*) of the veracity of his opinion, the latter simply receiving commands without claiming any justification (*bilā kayf*). (Part of the confusion over the 'gates of *ijtihād'*, as the Curriculum will discuss below (unit *C.2.3.2*), stems from the fact that whereas the process of *ijtihād* was never discontinued, the influence of *taqlīd* progressively limited its room to manoeuvre).

The purpose of *taqlīd* was to lay down a methodology for the *faqīh* for discovering and applying the law in the light of the already settled law. Muslim scholars have argued that this is also the function of the modern judge too, who discovers the law from the statutes and precedents to settle

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[100] This is based on the legal principle that 'the basic assumption on matters is permissibility' (الأصل في الأشياء الإباحة), for which there is a mnemonic verse: الأصل فيه شرعًا الإباحة * والنهي عنه مطلقًا قباحة ("Permission is the legal default – to deny this is a disfiguring fault").

[101] Kamali, *op cit*, *online text* p.327.

[102] "Nor was there, after this era, any perceived need to have a new system of *fiqh* constructed. Yet, the high standard of juristic-interpretive expectations was maintained until the early nineteenth century, when law and its celebrated legal theory were largely decimated" (W. Hallaq, *Sharī'a – Theory, Practice, Transformations*, Cambridge University Press 2009, pp.75-6).

[103] Kamali, *op cit*, *online text* pp.318-319.

[104] Al-Ghazālī went on to argue that *taqlīd* was for practical reasons obligatory: "it is more than obvious that not every person is capable of becoming an expert in law: Making it obligatory upon a layman to attain the status of *ijtihād* is asking him to do the impossible because it will lead people to abandon their respective professions as well as making families, and the whole system will collapse because everyone would devote his skills to acquire the knowledge of law. Moreover, it will also lead the scholars to leave the intellectual work and turn to the worldly affairs. Resultantly, the knowledge of law will vanish." Al-Ghazālī, *Al-Mustaṣfā min 'Ilm al-Uṣūl,* (Beirut: Dār Iḥyā' al-Turāth al-ʿArabī , n.d.),Vol. 2, 203.

the disputes brought to him. [105] The doctrine of *taqlīd* thus furnishes the basic material for developing an Islamic theory of adjudication. [106]

C2.2.3 - The categorisation of authority beyond scripture: ijmāʿ

Unit *C2.2.3* focuses on the third source of law after the Qur'ān and the Sunna, the 'consensus' (*ijmāʿ*) of the scholars, defined as the unanimous agreement of the *mujtahidīn* living after the death of the Prophet on any matter. Here the educator can outline how juxtaposition of this category to the Qur'ān and the Sunna in status was due to a perception that a number of Qur'ānic verses[107] and prophetic *ḥadīth*[108] indicated the possibility that the Islamic community collectively could never agree on an error, and therefore the consensus of the scholars was authoritative. The aim of *ijmāʿ* was to provide certainty in a world beyond the certitudes of scriptural text. Once a consensus was established, once it throws its weight behind a ruling, this becomes decisive and infallible, it becomes an authority in its own right and the 'raw material' of law is thus expanded.[109]

The educator can take the opportunity here to engage the students in discussion of the implications of al-Shāfiʿī's extension of 'the consensus of all the scholars' from the earlier conception of 'the people of Madina' to a universal *ijmāʿ* of *all* the learned Muslims. He can indicate the calibration of the consensus, from the explicit *ijmāʿ* (*al-ijmāʿ al-ṣarīḥ*) of all the *mujtahidīn* to the less binding tacit *ijmāʿ* (*al-ijmāʿ al-sukūtī*) where the silence of most of the *mujtahidīn* is deemed to indicate assent, but also the essential controversial status of this device. Legal authority demanded that only an absolute and universal consensus could be valid, while such a universal consensus – beyond basic matters of obligatory religious duties and the pillars of faith – was difficult, if not impossible, to obtain.[110] Historically *ijmāʿ* was to have a minimal impact on legal development[111] since, despite the theory, *ijmāʿ* could not actually add much to the 'raw material'.

Instead, its role was a declaratory one, confirming one opinion amongst many as the law.[112] And in this function its potential as a positive influence on legal latitude and flexibility (being based on human opinion outside the scriptural text)[113] was severely curtailed by the jurists' need to enshrine a new infallible authority, for which any diversity of view on a point of consensus had to

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[105] "In Islamic law, the task of the *faqīh* appears to be the same as that of the modern judge who is settling issues of law and fact" (Imran Ahsan Khan Nyazee, *Islamic Jurisprudence*, p.433).

[106] See Muhammad Munir, 'Precedent in Islamic Law', *Islamic Studies* 47:4 (2008) p.474.

[107] The principal Qur'ānic authorities cited are: *al-Nisā'* IV:59 and 83 ("*obey the messenger and those of you who are in authority*"*); al-Nisā'* IV:115 condemning those who "*follow a way other than that of the believers*"; *Āl 'Imrān* III:102 (*"Cling firmly together to God's rope and do not separate*"); *'Āl 'Imrān* III:109 ("*You are the best community that has been raised for mankind, You enjoin right and forbid evil and you believe in God*"); *al-Baqara* II:143 ("*Thus We have made you a middle nation*"); *al-A'rāf* VII:181 ("*And of those We created are a nation who direct others with truth and dispense justice on its basis*"); *al-Shūrā* XLII:10 (*"And in whatever you differ, the judgment remains with God*").

[108] Principally: *Sunan Ibn Mājah* 3950: "My nation will not unite on misguidance, so if you see them differing, follow the great majority" إِنَّ أُمَّتِي لَنْ تَجْتَمِعَ عَلَى ضَلَالَةٍ فَإِذَا رَأَيْتُمُ اخْتِلَافًا فَعَلَيْكُمْ بِالسَّوَادِ الأَعْظَمِ and *Sunan an-Nasā'ī* 4114 "Whoever parts from obedience, and splits away from the Jamāʿa and dies, then he has died a death of *jāhiliyya*" مَنْ خَرَجَ مِنَ الطَّاعَةِ وَفَارَقَ الْجَمَاعَةَ فَمَاتَ مَاتَ مِيتَةً جَاهِلِيَّةً (also *Ṣaḥīḥ al-Bukhārī* 7054; *Ṣaḥīḥ Muslim* 1848a and 1848c).

[109] This attainment of undisputable authority accounts for the conflicting views on whether a consensus could be established on the basis of *qiyās* given the function of analogy as an evaluation of doubts and probabilities. See Kamali, *op cit*, online text p.174.

[110] Al-Shāfiʿī acknowledged the unfeasability of *ijmāʿ* as a universal consensus, other opponents such as the Ẓāhirīs confined the consensus to the Companions alone, while the Mālikīs defined it as limited to the Madīnans. The Shīʿa Imāmiyya recognise only the *ijmāʿ* of the members of the Prophet's family.

[111] Wael Hallaq, for instance, places the figure as below 1 percent of historical legislation (W. Hallaq, *An Introduction to Islamic Law*. Cambridge University Press, 2009, p22).

[112] "The sources of law are established as reliable records of legal and theological messages by *tawātur*—their recurrent transmission within the community over time; *ijmāʿ* plays no role here" (Aron Zysow, *The Economy of Certainty, An Introduction to the Typology of Islamic Legal Theory*, Lockwood Press, 2013, p.xvi.)

[113] This was the view, for instance, of Ignaz Goldziher who argued that it provided Islam "with a potential for freedom of movement and a capacity for evolution. It furnishes a desirable corrective against the dead letter of personal authority." I. Goldziher, *Introduction to Islamic Theology and Law*, Princeton University Press, New Jersey 1981, p.52.

be dismissed.[114] While the delimitations of consensus in time or place were unresolvable, there was nevertheless a doctrinal distaste for surrendering *ijmāʿ* to a plurality of opinions and contexts. What developed instead was a deference to whoever constitued the acknowledged doctors of Islam, the *ahl al-ḥall wal-ʿaqd*, the people with the power 'to bind and to loosen'.

➢ *DISCUSSION POINT – Was the ijmāʿ of scholars useful or merely theoretical?*

In light of the above, the educator can initiate discussion on the reality of *ijmāʿ* in history. The themes can include some debates on the basic premises of traditional *ijmāʿ* and its usefulness as a legal concept:

- *It claimed certainty, but only on the basis of probability:*

  "Conclusively established as a source of law, consensus ratifies as certain any particular rule that may have been based on probable textual evidence" (Wael Hallaq)[115]

- *It was statistically insignificant*

  For the *mujtahid*, the prospect of running counter to the consensus of his legal school or to the wider community of jurists implicated him in a serious error, on the grounds that his opposition would effectively reopen settled cases to new solutions. This would then amount to questioning that certainty *including the conclusive texts on which that certainty was built*. As a precaution, jurists had to remain fully aware of the cases that had been subject to *ijmāʿ*. Yet the number of cases deemed to possess an unchallengeable certainty remained statistically insignificant.[116]

- *It was utopian*

  Under their classical definitions, *ijmāʿ was* subject to conditions that virtually rendered it impractical or utopian. Conditions that once may have been placed to discourage excessive diversity (which would threaten the integrity of the Sharīʿa) had the effect of narrowing the arena for *ijtihād* to the point of closing it off.[117] Moreover, the condition that all scholars were to be in agreement on a legal ruling not only had no basis in the Qur'ān or the Sunna, it was also impossible to attain due to the diversity of mental, cultural, ideological, circumstantial, geographical, and legal backgrounds of the scholars involved.

- *It was always a theoretical concept*

  A number of scholars have cast doubt on the historical reality of *ijmaʿ*, that the consensus never in fact took place in history, and that the most that a particular *mujtahid* was able to say on any particular matter was that 'no disagreement is known to exist.'[118] Former Shaykh of al-Azhar Maḥmūd Shaltūt (in office 1958–1963) argued that the conditions of a conclusive *ijmāʿ* (the agreement of all the *mujtahidīn* of the *umma*) was a) no more than a theoretical proposition never expressed in reality;[119] b) the majority (not unanimous) opinion of a *local* group of scholars in counsel always superseded the ruling of an individual scholar who issued a ruling represented as an *ijmāʿ*. Any conclusions therefore that were reached were by *shūrā,* and not by *ijmāʿ*.[120]

[114] Kamali, *op cit*, *online text* p.155.

[115] W. Hallaq, *An Introduction to Islamic Law*. Cambridge University Press, 2009, p22.

[116] W. Hallaq, *ibid.*

[117] See Kamali, *op cit*, *online text* p.178.

[118] ʿAbd al-Wahhāb Khallāf, *op.cit*. p.50: "The legislation initiative was an individual exercise, not a collective act of a *shūrā*, and opinions could equally concord or conflict, and the maximum that a jurist could say was: 'No disagreement is known regarding the ruling on this matter". وكان التشريع فرديا لا شوريا، وقد تتوافق الآراء وقد تتناقض، وأقصى ما يستطيع الفقيه أن يقوله: لا يُعلم في حكم هذه الواقعة خلاف .

[119] Shaykh Shaltūt noted in his work الإسلام عقيدة وشريعة (Dār al-Shurūq 8th ed. Cairo 1421/2001, p.66) that Aḥmad ibn Ḥanbal had made the following reputed condemnation of *ijmāʿ*: "whoever claims *ijmāʿ* is telling a lie" من ادعى وجوب الإجماع فهو كاذب (On this, see also M. Al-Shawkānī, *op. cit.*, p.353).

[120] ʿAbd al-Wahhāb Khallāf, *ibid:* "Was *ijmāʿ* actually concluded in this sense in the eras following the death of the Messenger? The answer is: No. And whoever takes a look at the issues on which the Companions ruled, and considers their *ijmāʿ* ruling, will see clearly that what occurred was an *ijmāʿ* only in this sense: an agreement among those present who had knowledge and a view on how they should decide on the matter in hand. This in reality was a ruling issued by the *shūra* of the community, not the opinion of the individual". هل انعقد الإجماع فعلا بهذا المعنى في عصر من العصور بعد وفاة الرسول؟ الجواب: لا، ومن رجع إلى الوقائع التي حكم فيها الصحابة، واعتبر حكمهم فيها

(The educator may choose to develop further discussions on this issue of the practicality of adopting historical concepts of law and the implications for legal reform, either here or later in the Course. See below *Module C4.2 - The challenges of a religious law in the contemporary world*).

C2.2.4 - The categorisation of authority beyond scripture: qiyās

Unit *C2.2.4* features the fourth major category of jurisprudence, as identified by al-Shāfiʿī, that is, the category of *qiyās* ('analogical reasoning'). This legal endeavour was considered necessary due to the obviously limited number of rulings that could be derived from the scriptural texts.

The majority of the scholars have defined *qiyās* as the application of the ruling of an original case (*aṣl*) to a new case (*farʿ* or 'branch'), on the grounds of there being an effective cause (ʿ*illa*) which is common to both.[121] The point being that a new law, equivalent to the sacred Law, *is not being initiated by a human being*. What is instead happening is an *extension of the understanding* of the sacred Law.

The basic starting point of the analogy process, and the main attention of the scholars, was directed towards finding the *'illa.* To this exercise the sacredness of the Law applied conditions: the *'illa* must be something that bears a proper and reasonable relationship to the law of the scriptural text, not something that will alter it unduly, since it is essentially designed to extend what is normal, not exceptional.[122] The *'illa* must also be capable of being applied to another case, and must be an evident, stable feature that is not subject to alterations according to differences of persons, time, place or circumstance.

Since *qiyās* is a speculative human act of assessing probability in the intentions of the Divine Lawgiver, the conclusions of this process were not accepted as attaining the authority status either of the scriptural texts (Qur'ān and Sunna) or of a definite *ijmāʿ*, and naturally could not overrule them. On the other hand, a ruling achieved through *qiyās* could not be itself abrogated due to its being ultimately founded upon the infallible Text. [123]

The tussle over reason and revelation

Qiyās is a particularly sensitive category among the mechanisms of Islamic law, since it represents the meeting place between the operation of human reason (*raʾy*) and obedience to the Text of revealed scripture (the *naṣṣ*). As such the relationship has been complex, and the subject of deep antagonisms historically.

The educator can engage the students in a discussion on the reasons for this antagonism. The question was essentially the following:

- Did the very exercise of speculating on the 'causes' of legal rulings constitute an (inadmissible) assessment of the workings of the divine mind?

This formed the basis of the objections voiced in particular by the Ẓāhirīs and the Ḥanbalīs. For these, the case made by supporters of *qiyās* that it was necessary since the scripture fails to

بالإجماع يتبين أنه ما وقع إجماع بهذا المعنى، وأن ما وقع إنما كان اتفاقا من الحاضرين، ومن أولي العلم والرأي على حكم في الحادثة المعروضة، فهو في الحقيقة: حكم صادر عن شورى الجماعة لا عن رأي الفرد.

[121] Kamali, *op cit*, *online text* p.182. Here the author gives a useful model of how this works, using the example of an extension of the prohibition on alcohol to drug-taking: 1) The original case, or *aṣl* is from Qur'ān V (*al-Mā'ida*), 90 which forbids drinking; 2) the new case (*farʿ*) is the taking of drugs; 3) the effective cause (ʿ*illa*) (which is an attribute – *waṣf* – of the *aṣl)* is the similar intoxicating effects of alchohol and narcotics; 4) the concluding rule (*ḥukm*) is therefore given as 'prohibition'.

[122] Hence its inapplicability, say, to extending the allowance concerning polygyny on the grounds of the practice confined to the person of the Prophet; cf. Qur'ān XXXIII (*al-Aḥzāb*):50-53.

[123] Any potential contradictions between one exericise of analogy and another, is resolved by the scholars by considering that the two analogies can coexist and be counted as two *ijtihāds*, without the one necessarily abrogating the other.

provide a *naṣṣ* for every matter, was contradicted by explicit denials of this in the Qur'ān itself[124] and therefore the practice of *qiyās* was *ḥarām*.[125] Moreover, to consider *qiyās* as some form of necessary supplement would be tantamount to stating that the Qur'ān fails to provide a complete guidance. Whereas, there are only three types of *rulings*: command, prohibition, and (by default) permissibility.[126] Instead, for the Ẓāhrī scholar Ibn Ḥazm, all of Allah's acts "have no 'cause' or 'purpose' to them at all, save their manifestation and their formation alone;"[127] [ii] "It is something that God Almighty wills, who does what He wills".[128] [iii] Allah is therefore not to be subjected to an assessment:

> This is something that should not be asked. It is not permissible for anyone to say: "Why was this the reason for this ruling and was not for something else?" Nor to say: "He did not make this thing a cause without there being another cause as well". Because whoever poses this question has disobeyed God Almighty, apostatised from the faith and contradicted the Almighty's words: *He is not to be questioned as to that which He doeth; it is they who will be questioned.*[129] Whoever asks about what He does is an immoral person.[130] [iv]

Moreover, a further argument made against the rationalist supporters of *qiyās* was that the law must be based on certainty, whereas *qiyās* is largely speculative and therefore superfluous. [131]

The educator can then usefully outline the reasons the scholars gave for justifying the practice of *qiyās*, and the eventual triumph of this rationalist method. The argumentation was broadly the following:

- Even where there are no scriptural *nuṣūṣ* to give a guidance on an issue, there are nevertheless oblique references to the benefits that accrue from a text or ruling, or the objectives which they may serve;[132] *qiyās* is therefore not an addition or a superimposition upon the *nuṣūṣ*, but their logical extension;
- Many Qur'ānic verses are themselves speculative in their meaning and implication (*ẓannī al-dalāla*) and the Qur'ān thus invites the believers to rational enquiry in the acceptance of its messages;
- A judgment may accordingly be based on the guidance that God has clearly given or on that which bears close similarity to it;
- There is a duty to identify the cause/rationale of the Qur'ān's rulings in order to be able to pursue the general objectives of the Lawgiver;
- The Qur'ānic verses adduced to ban *qiyāṣ* only forbid speculation in matters of belief, not for determining the practical rules of *fiqh;*

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[124] Specifically, *We have neglected nothing in the Book* (Qur'ān: *al-An'ām*, VI:38); and *We revealed the Book as an explanation for all things* (*Al-Naḥl*, XVI:89) and *This day, I have perfected your religion for you, and completed My favour unto you* (*Al-Mā'ida*, V:3).

[125] "For the Almighty said: *Have they then partners who have made lawful for them in religion that which Allah allowed not?* (Qur'ān XVII *al-Shūrā*, 21); the Text is clear that everything that does not have a *naṣṣ* for it is something that God Almighty has not permitted – this is the description of *qiyās*, and it is *ḥarām*". وقال تعالى: *أم لهم شركاء شرعوا لهم من الدين ما لم يأذن به الله * قال أبو محمد: فصح بالنص أن كل ما لم ينص عليه، فهو شئ لم يأذن به الله تعالى، وهذه صفة القياس، وهذا حرام. (Ibn Ḥazm, الإحكام في أصول الأحكام (ed. A. M Shākir), Vol. 8, Beirut 1403/1983, p.17.

[126] لأنه ليس في الدين إلا واجب أو حرام أو مباح، ولا سبيل إلى قسم رابع البتة Ibn Ḥazm, *op. cit.*, p.3.

[127] Ibn Ḥazm, *op. cit.*, p.104.

[128] Ibn Ḥazm, *op. cit.*, p.102.

[129] Qur'ān XXI (*al-Anbiyā'*), 23.

[130] Ibn Ḥazm, *op. cit.*, pp.102-3.

[131] For an extant summary of Ibn Ḥazm al-Andalusī's objections see Sa'īd al-Afghānī, ملخص إبطال القياس والرأي والإستحسان والتقليد والتعليل University of Damascus Press, Damascus 1960.

[132] Attempts were also made to see pointers towards determining a transfereable *'illa* at Qur'ān IV (*al-Nisā'*) 105: *so that you may judge among people by means of what God has shown you;* III *(Āl 'Imrān)* 13: *a lesson for those who possessed vision* and LIX (*al-Ḥashr*) 2: *Consider, you who have eyes!*

- *Qiyās* is a form of *ijtihād*, which is expressly validated in the Ḥadīth of Muʿādh ibn Jabal (see footnote above in unit *C2.2.2*);
- *Qiyās* may be a rationalist doctrine, but the ratiocination is confined to identifying a common *'illa,* after which the Qur'ānic *naṣṣ* determines what is to be followed in the new case. It cannot be used to alter the ruling of a Qur'ānic text. *Qiyās* is therefore *subordinating* personal opinion (*ra'y*) to the divine revelation.

The educator may thus conclude the discussion with a description of the progressive isolation of the currents opposed to *qiyās,* as a preliminary to illustrating in the following units the jurisprudential techniques that depended on the legitimacy of analogical reasoning.[133]

➢ *DISCUSSION POINT – The use of analogy in Sharī'a and in modern law*

In this context the educator can also usefully engage the students in a discussion on the use of analogy in the elaboration of law. In the case of Islamic law, despite the above justifications made by the supporters of *qiyās*, the *'ulamā'* have demonstrated a degree of reticence to identify the causes of the divine laws for fear of presumption against the deity. The educator may ask students to discuss whether this reticence is justified, with questions such as the following:

- *Is the mechanism for new legislation impeded by the necessity to tie the* ʻilla *(for a new legal issue to be resolved) directly to the source* naṣṣ*?*

  Does this discourage enquiry into the causes of the rules of Sharīʿa and instead advise total conformity to them without any search for justification or rationale?[134]

- *How should the contemporary faqīh view the unresolved debate on whether a ruling based on one* qiyās *can constitute the aṣl of another* qiyās*?*

  Al-Ghazāli, for instance opposed it on the grounds that *qiyās* founded on another *qiyās* is like 'speculation built upon speculation, and the further it continues along the line, the more real becomes the possibility of error'.[135] Ibn Rushd, however, defended it.[136]

- *Are there in-built conceptual barriers in Sharī'a to the promulgation of new laws?*

  If the new rulings are not, in the final analysis, permitted to be represented as 'new', of self-standing authority and thus constituting a new precedent, can the body of law keep pace with modern circumstances?

- *How does this reticence for analogy in Sharī'a compare with the use of analogy in civil and common law?*

  Does the lack of an infallible regulating source in Civil and Common Law lead to antinomianism in legislation? Whereas in Civil Law analogical reasoning is a tool to fill a gap in a code, and in this sense resembles its use in Sharīʿa, in Common Law analogical reasoning is used in the process of extension (*'ratio decidendi'*) not to a scriptural *naṣṣ* or a statute but to a judicial precedent, a prior instance of statutory interpretation, or an example from common sense. By nature, these are in step with contemporary events, customs and mentalities and do not appear to suffer thereby from a loss of authority. Nor do they risk

[133] An outline of this development can be found in W. Hallaq, 'Was the Gate of Ijtihad Closed?' *International Journal of Middle East Studies*, Vol. 16, No. 1 (Mar., 1984), pp.7-9.

[134] Kamali, *op cit*, *online text* pp.185-6.

[135] Al-Ghazālī, المستصفى من علم الأصول, (Ed. Dr. N. al-Suwayd), Vol. 2, p.185 ff. Kamali, *op cit*, *online text* p.184.

[136] Ibn Rushd, المقدمات الممهدات (Ed. M Ḥujjī), Beirut 1408/1988, Vol 1, p.38: فإذا علم الحكم في الفرع صار أصلا وجاز القياس عليه بعلة أخرى مستنبطة منه، وإنما سمي فرعا ما دام مترددا بين الأصلين لم يثبت له الحكم بعد. وكذلك إذا قيس على ذلك الفرع بعد أن ثبت أصلا بثبوت الحكم فيه فرع آخر بعلة مستنبطة منه أيضا فثبت الحكم فيه صار أصلا وجاز القياس عليه إلى ما لا نهاية له. His argument is that when one *qiyās* is founded on another *qiyās*, the *far'* of the second becomes an independent *aṣl* from which a different *'illa* may be deduced.

vulnerability to the perceptions of individuals.[137] Since, unlike with Islamic scripture, they all have identifiable causes unobscured by expression or by ambiguities of intention and can thus be ascertained with reasonable certainty, the analogical deduction is a relatively easier proposition.[138] What conclusions may be drawn from this comparison?

- *What are the actual tendencies in legal systems that do claim to be Islamic?*

  In his work *Uṣūl al-Fiqh* the influential Ḥanafī jurist Muḥammad Abū Zahra examined the position taken by Ibn Rushd and observed that from a juristic viewpoint, it was persuasive. Moreover, the legal practice of basing the *qiyās* on the *far'* was effectively the practice in Muslim countries where "judges' rulings are being based on analogy, and on the extraction of the *'illa* from legal texts and extension of them, and these rulings may be decided by the Court of Cassation, and when it does so, these become new legal principles on which a *qiyās* may be based, and thus applied where required without the need to refer to their *aṣl* in the legal texts".[139] Is the pre-occupation with sourcing the scriptural *aṣl* therefore more of an academic exercise than a practical function of jurisprudence?

C2.2.5 – The categorisation of authority beyond scripture: equitable reasoning

The potential of *qiyās* to extend the spectrum of rulings derivable from the scriptural text took a step further in the development of the category of 'hidden' *qiyās.* In unit *C2.2.5* the educator can outline how this hidden *qiyās* (*qiyās khafī*), or 'preferred' *qiyās* (*qiyās mustaḥsan*) answered to a larger range of issues by engaging the intellect beyond a superficial observation of analogies, and into deeper reflection and analysis, so as to arrive at equitable solutions based on a human judgement of that which was 'fairer' (*aḥsan*).

The interesting point here is that the link with the scriptural Text is now at its weakest, in that there is clearly no direct authority for this process of *istiḥsān* either in the Qur'ān[140] or in the Sunna.[141] Validation had to be sought from elsewhere. The educator can demonstrate the problems that this departure from the Text caused by giving illustrations from the scholarly debates: notably al-Shāfi'ī's trenchant objection to the category:

> *Istiḥsān* is pure self-indulgence… If such a person expresses an opinion that is not based on a binding report or an analogy, then that person is closer to sin …. The basis of knowledge remains the Book, the Sunna, consensus, non-Prophetic reports, and analogical reasoning based on these.[142] *v*

The charge was potentially so toxic that the defence often had to be couched in terms of how *istiḥsān* was indeed a form of *qiyās* – a defence which actually risked stripping *istiḥsān* of its independence from the Text and thus the ability for scholars to extend the spectrum and suppleness of legal thinking. The educator can highlight how the debate on whether *istiḥsān* was or was not a subcategory of *qiyās* was a lengthy one, with various authorities such as Abū Ḥanīfa

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[137] This is the particular function of 'classificatory analogies'. See Grant Lamond, 'Analogical Reasoning in the Common Law', *Oxford Journal of Legal Studies*, Volume 34, Issue 3, Autumn 2014, Pages 567–588.

[138] Kamali, *op cit*, *online text* p.186.

[139] Muḥammad Abū Zahra, أصول الفقه Dār al-Fikr al-'Arabī, 1377/1958, 232 (paragraph no.230). يعد معمولا به في تفسير القوانين الوضعية, فإن أحكام القضاة قد تبني على اقيسة, واستخراج علل النصوص القانونية والبناء عليها, وإن هذه الأحكام قد تقررها محكمة النقض, فإذا قررتها تصير مبادئ قانونية يمكن القياس عليها, وتطبق على مقتضاها من غير نظر إلى أصلها من نصوص القانون

[140] Ḥanafī jurists defending *istiḥsān* attempted to make a link to the Text by citing two Qur'ānic verses: *al-Zumar*, XXXIX:18: *And give good tidings to those of my servants who listen to the word and follow the best of it* [aḥsanahu]. *Those are the ones God has guided and endowed with understanding* and *al-Zumar*, XXXIX:55: *And follow the best* [aḥsan] *of what has been sent down to you from your Lord*. The argumentation here was whether the divine Lawgiver was distinguishing a higher, more equitable message from that which may be considered as standard.

[141] At the most, two *aḥādīth* are adduced to support *istiḥsān*: "What the Muslims deem to be good is good in the sight of God" (possibly not an actual *marfū'* ['elevated'] *ḥadīth* but a *mawqūf* ['stopped'] *ḥadīth* of a Companion); "No harm shall be inflicted or reciprocated in Islam" لاَ ضَرَرَ وَلاَ ضِرَارَ *Sunan Ibn Mājah*, 2340 https://sunnah.com/ibnmajah:2340 .

[142] Al-Shāfi'ī, الرسالة للامام الشافعي (ed A. M Shākir) Dār al-Kutub al-'Ilmiyya, Beirut n.d., p.507.

and Imām Mālik adduced to defend its independent status. The shadow of al-Shāfiʿī's objection, however, remained, and any attempt to inject rationalist principles into Islamic legal theory had to seek justification by *qiyās*, so that the scope of human reasoning in law came to be limited, at least overtly, to analogy alone.[143]

The acceptance of human arbitration remained an uneasy exercise. Jurists were wary of the potential of *istiḥsān* to play fast and loose with the injunctions of the Sharīʿa. Whereas early legal thought predating al-Shāfiʿī had freely accepted the use of human reason (*raʾy*), its use now needed to be camouflaged somewhat by this use of 'seeking the most equitable solution' (*istiḥsān*) as representing the ultimate purposes of the divinity.[144] In this way *raʾy* would not be seen as being granted a sovereign role in the process. Effectively, *istiḥsān* persisted as a possibility in Islamic legal thought even though its full potential was not realised, with jurists preferring to uphold only those *istiḥsān*-based rulings made by scholars in the past.

The educator can outline this important but insufficiently exploited tool of Islamic law, as a valuable means for avoiding the damage wrought by rulings that are either too general, or too specific and inflexible. The value of *istiḥsān*, and the need for its overt defence, is coming to be defended by contemporary Sharīʿa scholars, who argue that a clear and well-defined role for it "would hopefully mark a new opening in the evolutionary process of Islamic law."[145] ʿAbd al-Wahhāb Khallāf, for instance, makes the case that

> on deeper investigation it can be seen that *istiḥsān* is a departure from an apparent or universal ruling of a law in favour of a variant ruling which warrants such a departure. *It is not a legislation based on mere inclination.* For many incidents each judge must evaluate how, in order for the true benefit (*maṣlaḥa*) to be secured, in the specific case an adjustment must be made from the apparent legal rule.[146] [vi]

Ultimately, the issue for the jurists comes down to the conception of the purposes of law, that is, how far the benefit (*maṣlaḥa*) of the believers can be set against the role of the law as setting the parameters of the faith. This issue occupies the following units *C2.2.6* to *C2.2.8.*

- *DISCUSSION POINT – Equity and Istiḥsān – a comparison*

  The educator can here introduce to the student the similarities and the subtle differences between 'equity' as understood in modern law systems, and the 'equitable reasoning' understood in the term *istiḥsān.* For while they bear a close similarity to one another, the two are not identical. Both stem from an observation that applying the letter of the law in a specific case may perform an injustice, and they thus authorise a departure from that law. In the Civil Law system equity was integrated in the legal codes, whereas in the Common Law system it became an independent body of law and developed separate courts, called 'courts of equity' or 'courts of chancery' which contained their own system of set rules and procedures.

  The principle difference between *equity* and *istiḥsān*, of course, is the ultimate point of reference and authority: for contemporary law it is the concept of natural rights as agreed by mankind and expressed over history;[147] in Islamic law the point of reference is the Qurʾān and the Sunna and the underlying values and principles of the Sharīʿa. Given their contrasting starting points, the educator may usefully

[143] "What is analogical reasoning? Is it legal interpretation? Or are they different? They are two terms for the same concept … If there is no [overtly binding] rule, then one should seek what indicates the correct answer to the issue in question by means of legal interpretation. Legal interpretation means analogical reasoning" قال: فما القياس؟ أهو الاجتهاد؟ أم هما مفترقان؟ قلت: هما اسمان لمعنىً واحد... وإذا لم يكن فيه بعينه طُلِب الدلالة على سبيل الحق فيه بالاجتهاد. والاجتهادُ القياسُ . Al-Shāfiʿī, الرسالة للامام الشافعي (ed A. M Shākir) Dār al-Kutub al-ʿIlmiyya, Beirut n.d., p.477.

[144] Thus N. Coulson: *Conflicts and tensions in Islamic jurisprudence*. University of Chicago Press, 1969, p.7.

[145] Kamali, *op cit, online text* p.234.

[146] ʿAbd al-Wahhāb Khallāf, علم اصول الفقه, Maktabat al-Daʿwā al-Islāmiyya, Shabāb al-Azhar, n.d. p.83.

[147] In western legal systems the term 'equity' stems from the *aequitas* of Roman Law, itself founded upon the *ἐπιείκεια* first defined in a juridical sense by Aristotle *Ηθικά Νικομάχεια,* V 14.

evaluate with the students the relative merits of the two systems, and conduct some productive discussions such as:

- The assumptions on the nature of right and wrong underlying the legal systems – whether these are inherent in nature or the property of revealed scripture alone;
- The basis on whether right and wrong in law are capable of human evaluation or must require the guidance of divine will;
- The practical implications of an independent legal entity for *equity* (as in Common Law) that references a superior law, as opposed to the status of *istiḥsān* which does not seek to constitute an independent authority beyond the Sharī'a;
- The evaluation of the relative robustness of the two conceptions – In the light of lack of authority, ultimately, of *istiḥsān*,[148] can the appeal to *istiḥsān* guarantee the application of an adjusted ruling against legal challenge in the way that an organised series of independent courts is designed to do?
- The effect on the statistical availability of the raw material for legal reference in the contrasting conceptions of *equity* and *istiḥsān*;
- The practical level of the convergence of values between *istiḥsān* in the Sharī'a and *equity* in natural law – Which conception is the more creative and the more versatile for the contemporary environment? Is there likely to be an essential difference in the purpose of the legal methodology and in the quality of its results?

C2.2.6 - The debate on al-maṣlaḥa al-mursala and its implications

In unit *C2.2.6* the educator can illustrate the next step in the inexorable trajectory of Islamic legal thought from a Text-based system to one working on the basis of the supremacy of human reason. In the legal category of *al-maṣlaḥa al-mursala* we enter into the realm of legal reasoning entirely independent of the *naṣṣ* of the Qur'ān or the Ḥadīth, in that, unlike *qiyās* (or *istiḥsān* which derived from *qiyās* and extended it), it does not take its starting point at all from a scriptural text.

The focus of this category is squarely on what serves the broader benefit or interest (*maṣlaḥa*) of the community,[149] and

> "that which brings the people close to well-being (*ṣalāḥ*) and moves them further away from corruption (*fasād*), even if the Prophet had not specifically decreed this, nor the Revelation brought this down."[150] vii

The benefit is held to be 'unrestricted' (*mursala*) since it is not restricted or defined by the established rules of the *Sharī'a.* The educator can summarise the types of *maṣlaḥa* that the doctrine addresses: the five 'essentials' (*ḍarūriyyāt*) of religion, life, intellect, lineage and property, the 'supplementary needs' (*ḥājiyyāt*) for avoiding hardship and the 'embellishments' (*taḥsīniyyāt*) or improvements, moral and material, that these *maṣaliḥ* engender. He may then usefully describe the conditions for its application: that it must not be speculative but answering to a perceivable need, that it must have universal application (not to a specific person or group) and must not conflict with an Islamic principle or value demonstrated by a *naṣṣ* or an *ijmā'.*

[148] Qur'ān XXXIX (*al-Zumar*) 18 and XXXIX (*al-Zumar*) 55.

[149] The 'benefit' is assumed, of course, in the Text itself, but if there is an open indication in the text of the benefit intended, this type of *maṣlaḥa* is termed *maṣlaḥa mu'tabara* ('validated *maṣlaḥa'*) and therefore of first rank. Where there is no indication at all, it is *maṣlaḥa mursala*, which occupies a subordinate rank.

[150] Ibn al-Qayyim al-Jawziyya, الطرق الحكمية في السياسة الشرعية Ed. N. al-Ḥamad, Dār 'Ālam al-Fawā'id, Majmaʿ al-Fiqh al-Islāmī, Jeddah, Vol. 1, p.29.

Supporters of the category nevertheless adduced precedent for the practice, that it could be witnessed in the behaviour of the Companions and the Successors who enacted laws and took measures to secure the public benefit without a textual authority to validate this,[151] and that *ḥadīth* to the effect that 'there should be neither harm inflicted nor suffered' constituted the nearest thing to an authorising *naṣṣ*.[152] An interesting point for the educator to emphasise is that the authority for this tool of *fiqh* is now derived from its relation not to the *words*, but to the perceived *objectives,* of the Divine Lawgiver.[153] The implication being that to neglect these *maqāṣid al-sharī'a* is tantamount to abandoning the Sharī'a itself. In this way *al-maṣlaḥa al-mursala* becomes an integral part of the divine Lawgiver's will.

The main issue, however, which the educator can demonstrate, is the deep implications of *al-maṣlaḥa al-mursala* for the nature of law and its relation to scripture, and the bitterness of the controversy that it engendered.

Ṣadd al-Dharā'i

A further extension of the *maṣlaḥa mursala* category (though often included in the introductions to *fiqh* as an alternative legal source) is the concept of *ṣadd al-dharā'i'* or 'blocking the means [to evil]'. The educator can place some emphasis here on the function of this concept since it is an important weapon in the armoury of modernisers countering the resistance to updating the Sharī'a on the grounds of authenticity (see below in the *Discussion Point* in unit *C2.2.7 – 'Non-Sharī'a authority and the validity of change'*). The application of *ṣadd al-dharā'i'* has been a useful method for resolving conflicting source-texts when a new circumstance has arisen, or a qualifying detail that leads a lawful principle into conflicting with other principles or maxims[154] or producing an unlawful result.[155]

The primacy of al-maṣlaḥa al-mursala over the Text

At this point the educator can introduce an important theme for discussion, one that has exercised the minds of jurists from the earliest period: the problem of the legal authority of the scriptural text and the challenges to this supremacy resulting from scholarly speculation.

In his commentary on the *ḥadīth* text *lā ḍarar wa-lā ḍirār* ('there should be neither harm inflicted nor suffered') the Ḥanbalī jurist Najm al-Dīn al-Ṭūfī[156] took the implications to their logical conclusion: when there is a conflict between the *maṣlaḥa* and a Text or the *ijmā'* of the scholars, the former must take priority – on the grounds that the *maṣlaḥa* was also in this sense supported by another 'Text'. Moreover, the aim was not only to avoid harm, but to *remove* it from any legislation, present or previous, that was causing harm.

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[151] The classical illustrations of this are ʿUmar b. al-Khaṭṭāb's suspension of the execution of the prescribed punishment for theft in a year of famine, and his approval of the views of the Companions to execute a group of criminals for the murder of one person "taken despite the clear ruling of the Qur'ān concerning retaliation (*qisas*), which is 'life for life' and the Qur'ānic text on the amputation of the hand, which is not qualified in any way whatsoever" (Kamali, *op cit*, *online text* p.237).

[152] Cf. from the *Sunan Ibn Mājah*, 2340: " لاَ ضَرَرَ وَلاَ ضِرَارَ " أَنَّ رَسُولَ اللَّهِ صلى الله عليه وسلم قَضَى أَنْ. The argument on this – that there is a *naṣṣ* that authorises Reason's departure from the *naṣṣ* –would appear to justify M. Arkoun's criticism of the fundamental restraints imposed on Islamic thought from its being 'walled up in a logocentric enclosure.' (Mohamed Arkoun, *The Unthought in Contemporary Islamic Thought,* Saqi Books, London 2002, pp.174-5).

[153] The grounding for this concept is held to be Qur'ānic verses such as: يَا أَيُّهَا النَّاسُ قَدْ جَاءَتْكُمْ مَوْعِظَةٌ مِنْ رَبِّكُمْ وَشِفَاءٌ لِمَا فِي الصُّدُورِ وَهُدًى وَرَحْمَةٌ لِلْمُؤْمِنِينَ *O mankind, a direction has come to you from your Lord, a healing for the ailments in your hearts, a guidance and a mercy for believers.* (*Yūnus*, X, 57) and مَا يُرِيدُ اللَّهُ لِيَجْعَلَ عَلَيْكُمْ مِنْ حَرَجٍ *God never intends to impose hardship upon people*. (*al-Mā'ida*, V, 6).

[154] The generally adduced maxims include: الضرر يزال *'harm is to be removed';* المشقة تجلب التيسير *'difficulty demands easing'* (founded upon يُرِيدُ اللَّهُ بِكُمُ الْيُسْرَ وَلَا يُرِيدُ بِكُمُ الْعُسْرَ Qur'ān *al-Baqara* II, 185); الأَعْمَالُ بِالنِّيَّةِ *'actions are judged according to intention'* (founded upon *ḥadīth*, e.g. *Ṣaḥīḥ al-Bukhārī* 3898).

[155]The common example adduced is the Qur'ānic text which forbids the Muslims from insulting idol worshippers (normally considered a prasieworthy act): *Revile not those unto whom they pray beside Allah lest they wrongfully revile Allah through ignorance* (*al-An'ām* VI:108).

[156] Najm ad-Dīn Abū r-Rabīʿ Sulaimān ibn ʿAbd al-Qawī al-Ṭūfī (1276 /673 – 1316/716) - His most complete writings on *maṣlaḥa* are in his commentary on al-Nawawī's collection of 40 Ḥadīth, where he comments on this the 32nd hadith, *lā ḍarar wa-lā ḍirār.* See Najm al-Dīn al-Ṭūfī, كتاب التعيين في شرح الأربعين, ed. A. ʿUthmān, Beirut and Makka, 1419/1998, pp.234-280 (with an introductory discussion on *al-maṣlaḥa* by the editor, pp.19-24).

This was a bold initiative which al-Ṭūfī was conscious would meet with stiff opposition.[157] The objectors duly understood the process as *maṣlaḥa* unacceptably overriding the divine Text. Moreover, accepting it as an independent proof of Sharī'a, they argued, would lead to chaos in the issuing of rulings: what was permissible and what was forbidden would now be held to be applicable in some place or to some persons and not to others – a fact which would undermine the timeless validity of the Sharī'a. Since there was no textual certification of the validity of rulings arrived at under *al-maṣlaḥa al-mursala*, no legislation could be based on it.[158]

The contemporary debate on al-Ṭūfī's thesis

Given the implications of al-Ṭūfī's theory on *maṣlaḥa*, it is not suprprising that it has continued to exercise the mInds of contemporary jurists ever since his thesis was revisited by early 20th century reformers such as Jamāl ad-Dīn al-Qāsimī and Rashīd Riḍā[159]. While their purpose was to forestall the growing European-influenced secular jurisprudence by embedding calls to update the Sharī'a in an indigenous reforming template, in practice the attempt strengthened the forces of conservatism. The educator can here usefully outline for the students the contours of the debate. The negative observations voiced by al-Ṭūfī's contemporaries were expanded upon and intensified along the following lines:

- The case made by al-Ṭūfī on the prioritisation of *maṣlaḥa* over the *nuṣūṣ*, which are flexible in themselves, is illogical and self-contradictory;[160]
- 'Al-Ṭūfī has become a rallying point for secularisers'[161] who deny many of the legal rulings since these rulings contradict the prevailing secular culture:

  > The end result of prioritising *al-maṣlaḥa* over the *naṣṣ* is that the *nuṣūṣ* became a useless burden, since mankind follows his own *maṣāliḥ* wherever they lead … the methodology of the modernists, and those affected by it, is one of implementing purely mundane *maṣāliḥ*, keeping up with the times and keeping pace with developments. In doing so they found that the *nuṣūṣ* and evidences were not producing what they required, and were thus forced to 'interpret' them and distort them so that they presented no impediment to 'modernity' and 'progress'.[162] viii

- 'The sacred texts are being dispensed with':

  > Indeed, some of them would not even pay attention to the *nuṣūṣ* at all until they saw that people were attracted to these *nuṣūṣ,* and they understood that simply ignoring these *nuṣūṣ* was not going to be enough … There is a world of difference between those who view the *nuṣūṣ* as a source for guidance and follow them, and those who think outside of these *nuṣūṣ* and approach them only for the purpose of dispensing with them.[163] ix

Nevetheless, contemporary scholars are also mounting a defence of *maṣlaḥa* as the overriding priority of the Sharī'a. Given that less than 20 percent of the elements of *fiqh* are sourced directly from the scriptural texts, they argue that the condition that the objectives of the Qur'an can only be implemented if there is a supporting *naṣṣ* available amounts to an unwarranted restriction on the general objectives of the Lawgiver. The negative results would be:

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[157] Some of his accusers expelled him from the community of believers, saying that he sought to uproot the Sharī'a. For an analysis of al-Ṭūfī's initiative, see Salīma Sibā'ī, المصلحة عند الطوفي من خلال التعيين في شرح الأربعين in the journal مجلة العلوم الاجتماعية والإنسانية Vol. 10, pp.281-300.

[158] Of the categories of *maṣlaḥa* mentioned above, al-Ghazālī accepted, at most, the *ḍarūriyyāt* and outright denied the validity of 'supplementary needs' (*ḥājiyyāt*) or 'embellishments' (*taḥsīniyyāt*) to override the *naṣṣ*.

[159] Muṣṭafā Zayd argues that the publication in *al-Manār* was based on al-Qāsemī's tendentious reading of al-Ṭūfī. See M. Zayd, المصلحة في التشريع الإسلامي (ed. M. Yusrī) July 2003, Dār al-Yusr, Cairo, 1954, p.72 (paragraphs 127-130).

[160] M. Zayd, *op.cit.*, p.117 (paragraph 240).

[161] "Al-Ṭūfī became a pulpit for any errant deviator to ascend and scream into the face of the Sharī'a in al-Ṭūfī's name" وأصبح الطوفي بعدها منبراً يعلو عليه كلّ محرّف تائه ليصرخ في وجه الشريعة باسم الطوفي Dr. Fahd al-'Ajlān, مع نظرية المصلحة عند نجم الدين الطوفي ('On Najm al-Dīn al-Ṭūfī's Theory of al-Maṣlaḥa'), *Ṣayd al-Fawā'id*, September 2011. http://www.saaid.net/Doat/alajlan/74.htm

[162] *Ibid.*

[163] *Ibid.*

- that the capacity of the *Sharī'a* to accommodate social change would be restricted;
- that the welfare and interests of the community would remain unaddressed;
- that the Muslim community would consequently suffer stagnation.

ʿAbd al-Wahhāb Khallāf sums up the danger of prohibiting a*l-maṣāliḥ al-mursala* and thus relegating reason to 'the role of handmaid to the revealed Text':

> It seems to me that the Law is more probably based upon a*l-maṣāliḥ al-mursala*, since if this door is not left open, Islamic legislation would remain frozen and cease to keep pace with changing times and environments. Whoever maintains that every detail of a person's interests, in any time or any environment, has been catered for by the Lawgiver and legislated through His *nuṣūṣ* and general principles, is not supported by facts on the ground. There is no doubt that you will find that some *maṣāliḥ* have neither been upheld nor indicated by the *Sharī'a* in specific terms.[164] x

As for the fear of abandoning the scriptural texts, the argument of the proponents was that this too can be discounted:

> Whoever fears that *al-maṣlaḥa* encourages tampering, injustice, and the following of arbitrary whims should have his fears allayed by understanding that legislation on this basis is made only where three conditions are met: that it be a real public interest, that it does not contradict a *naṣṣ*, and that it does not contradict a legal principle.[165] xi

The general defence was that in any case the scope for conflict was narrow, given that the texts which dealt with transactions were very few in comparison with the texts which dealt with '*ibādāt* ('religious observances').[166]

➢ *DISCUSSION POINT – Al-maṣāliḥ al-mursala: a Sharī'a mechanism for overriding Sharī'a?*

The educator can here introduce for the students a debate on the implications of the discussions held in unit *C2.2.6* on two levels:

i. Is the mechanism of al-maṣāliḥ al-mursala effectively a means of overruling the Sharī'a?

Even though the proponents of *istiḥsān* and *al-maṣāliḥ al-mursala* were united in prohibiting their application to '*ibādāt* and *muqaddarāt* ('fixed stipulations') – on the grounds that these were exclusively communicated by Revelation – there still remains the issue of the implications of the working of this legal doctrine on the *mu'āmalāt* ('mundane dealings') of the Muslim community. Al-Ṭūfī's view was that "public interest should be relied upon on all questions of transactions and other rules" so that

> "If the *Sharī'a* should prove inadequate to delineate that interest, we would implicitly know that we are to have recourse in attaining it to those matters that foster it"[167] xii

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[164] ʿAbd al-Wahhāb Khallāf, علم اصول الفقه, Maktabat al-Daʿwā al-Islāmiyya, Shabāb al-Azhar, n.d. p.88. . Dr. Khallāf makes a further point: "To enact a law may be beneficial at one time and harmful at another; and even at one and the same time, it may be beneficial under certain conditions, but prove to be harmful in other circumstances" (p.84). وتشريع الحكم قد يجلب نفعا في زمن وضررا في آخر، وفي الزمن الواحد قد يجلب الحكم نفعا في بيئة ويجلب ضررا في بيئة أخرى.

[165] *Ibid.*

[166] Cf. Ṣubḥī Maḥmaṣānī's conclusion: "Most of the rules that lend themselves to changes and modifications relate to questions of detail and not to the universally applicable maxims which in principle remain the same in all (Muslim) lands past, present and future". ان مجال الخلاف يسير, لان النصوص المتعلقة بالمعاملات هي قليلة جدا بالقياس إلى النصوص المتعلقة بالعبادات ... ان الأحكام المعرضة للتغير والتعديل معظمها يتعلق بالجزئيات, دون القواعد الكلية التي تبقى مبدئيا ثابتة واحدة في جميع البلد ماضيها وحاضرها ومستقبلها. See Ṣ. Maḥmaṣānī, فلسفة التشريع في الإسلام, Beirut 1365/1946, p.188.

[167] Ṣ. Maḥmaṣānī, *Op.cit,*. p.187.

This was a position that was sarcastically abbreviated by opponents as "the text should be followed unless public interest requires otherwise." [168] A number of fundamental questions emerge from this controversy:

- Does the prioritisation of *al-maṣlaḥa* over the evidences of the Sharī'a constitute a form of speculative *ijtihād*? Would this therefore allow the voicing of different opinions as permissible, and allow the development of Islamic law to remain in step with contemporary life?
- If human judgement in this way is to supersede the *naṣṣ*, what are the implications of this for the concept of a divinely ordained law?
- Does this indicate that Sharī'a law, in terms of the practical applications, can only ever be at the most a minority sub-section of law (i.e. '*ibādāt*)?
- Are the opponents of *al-maṣlaḥa al-mursala* thus accurate in their assumptions that the tool has the potential to render Sharī'a obsolete?

ii. Is this mechanism ultimately an acquiescence to western, secular conceptions of law?

Opponents of *al-maṣāliḥ al-mursala* claim that to promote this tool is to enshrine western, secular conceptions of law in the Muslim state. The comparison is usually made with the 'utilitarianism' principle expounded by John Stuart Mill and Jeremy Bentham, in which the 'public benefit' discussed by the Muslim jurists resonates with that doctrine's founding of ethics and legislation upon the principle of 'the greatest good for the greatest number of people'. [169]

The educator may thus pose the question:

- Is this 'utilitarian' ethic a purely materialist form of ethics, and therefore inferior to the ethics promoted by the Islamic message?

A recent study has argued that it is not, and indeed, that it is entirely capable of being integrated into the Islamic religious and philosophical heritage.[170]

The educator can explore this potential through clarifying the meaning of 'utilitarianism', to one that implies that "the option that promises to produce the most happiness, and the least pain, for the greatest number of people affected by our decision should be regarded as the most morally worthy course of action."[171] Here the principles of *istiḥsān* and *almaṣāliḥ al-mursala* focus on the what acts to the benefit of the people as an ethical good in itself, in the same way that 'the greatest good principle' in the West functions. *Prima facie*, therefore, there appears to be no barrier to legal integration between the two concepts of law.

The potential point of conflict, however, may arise from the fact that some rules in the Islamic *Sharī'a* are fixed, for which matter such a maxim like "greatest good for the greatest number" may not necessarily be applicable. The educator may usefully explore with the students where these potential points of conflict lie, for example:

[168] Ş. Maḥmaṣānī, *Op.cit*,. pp.187-188. فلما نجم الدين الطوفي في رسالة المصالح المرسلة يقصد إلى بيان ان حديث "لا ضرر ولا ضرار" هو بمنزلة ان يقال بعد كل حكم نص عليه: الا ان اقتضت المصلحة خلافه . The process of changing *fatwās* according to changes in circumstances is exemplified in Ibn Qayyim al-Jawziyya's famous example of allowing the consumption of alcohol by the Tatars on the grounds that: "God has prohibited strong drinks because they divert people away from God and prayer; but strong drinks mererly divert these people from killing, capture of children and plunder of property; so leave them alone!" إنما حرم الله الخمر؛ لأنها تصد عن ذكر الله وعن الصلاة، وهؤلاء يصدهم الخمر عن قتل النفوس، وسبي الذرية، وأخذ الأموال، فدعهم! (Ibn Qayyim al-Jawziyya, إعلام الموقعين , Vol III, p.5).

[169] "Actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness pleasure is intended, and the absence of pain; by unhappiness, pain or the privation of pleasure." (J. Bentham, *An Introduction to the Principles of Morals and Legislation*. Batoche Books, p.14).

[170] M. Abdul Jalil, N. Mohammed Kamil, M. Khalilur Rahman, 'The greatest good for the greatest number of people: an Islamic philosophical analysis', *Journal of Social Sciences and Humanities*, Universiti Kabangsaan Malaysia, Vol. 9, No. 2 (2014).

[171] Ghani, Abdullah Abdul and Adam, M. Zainol Abidin, *Business Ethics*, Malaysia: Oxford University Press 2011.

- Do these points of difference refer mainly to areas of '*ibādāt* and are therefore not substantive in terms of the everyday transactions that laws seek to regulate?
- Does the classical definition of the five 'essentials' (*ḍarūriyyāt*) of *maṣlaḥa* – religion, life, intellect, lineage and property – as defined by al-Ghazālī amongst others, hold within it a 'barrier to entry' against legal harmonisation and symbiosis in a pluralistic environment? What does 'religion' here mean: the interests of the Islamic faith alone – or the interests of 'freedom to practice a religion'? Does 'the greatest good for the greatest number of people' therefore include non-Muslims?

C2.2.7 - Further legal mechanisms beyond scripture

Having outlined the arenas of legislation that go beyond the scriptural text, in unit *C2.2.7* the educator can illustrate the mechanisms that extend the potential sources of law onto a broader dimension. Though historically not prominent in *uṣūl al-fiqh,* the categories of *'urf* and *istiṣḥāb* assume importance in this role, since they open up the possibility of *incorporating contemporary non-Muslim experience and legislatory practices into the Islamic system.*

The category of *'urf* ('custom') is defined as 'recurring practices which are acceptable to people of sound nature.' The conditions for adopting such practices are that they do not violate the *naṣṣ* and the definitive principles of the Sharī'a. While there is no explicit authorisation from the Qur'ān and the Sunna on how to legislate without a text or by extension an analogy drawn from a text, scholars have sought its authorisation in the generic Qur'ānic stipulation to "*enjoin what is recognised as right* (maʿrūf) *and forbid that which is repudiated*".[172] The educator can underline the value of this starting point for change and modernisation by noting how, unlike the case with *ijmā',* recognition of an *'urf* does not need to be unanimous,[173] nor validated by *'ulamā'.*[174] On the question of seeking authorisation in Islamic law for adopting practices that have their origins outside the Islamic heritage the Syrian scholar Aḥmad Fahmī Abū Sunna summed up the case:

> One may act on this understanding with regard to most of the prevailing norms in transactions, social mores, and the political traditions that a new civilization may bring ... Regarding what people have come to recognise as being beneficial we refer simply to the principle of 'permissibility being the default'; and what they have come to perceive as harmful and better set aside, we refer to the principle of prohibition. [175] xiii

Istiṣḥāb

The operative element which the educator may underline, and the basis of its non-textual authority, is *continuity* or the assumption of a practice or norm (either a positive or negative one) until the contrary is established by further evidence. This presumption of continuity or *istiṣḥāb*[176] is the last ground for the *muftī* to make a *fatwā*, after exhausting all avenues in the search for a legal indication in the Qur'ān, the Sunna, the consensus of the scholars, or through deduction by

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[172] Qur'ān *Āl 'Imrān* III, 110. Further attempts at locating a *naṣṣ* such as *al-Ḥajj* XXII, 78: *God has not laid upon you any hardship in religion* and *al-A'rāf* VII, 199: *Enjoin good and turn aside from the ignorant*, are disputed.

[173] Hence the two categories of 'general *'urf'* and 'specific '*urf'* according to whether a practice was widespread or localised.

[174] Post-Islamic custom on the other hand, such as the 'practice of the Madīnans', is not counted as *'urf,* but rather as a non-textual source of *sunna.*

[175] Aḥmad Fahmī Abū Sunna, العرف والعادة في رأي الفقهاء Al-Azhar, Cairo 1947. Al-Ghazālī, however, opposed this assumption of 'permissibility being the default': "Regarding an invalidation of the doctrine of permissibility, I say that what is permissible calls for a permitter, just as knowledge and remembrance calls for a knower and a rememberer. The Permitter is God Almighty, who grants through His word the choice between doing and abstaining. Where there was no word, there was no choice being offered, so there was no permissibility granted." أما إبطال مذهب الإباحة فهو أنا نقول المباح يستدعي مبيحا كما يستدعي العلم والذكر ذاكرا وعالما والمبيح هو الله تعالى إذا خير بين الفعل والترك بخطابه فإذا لم يكن خطاب لم يكن تخيير فلم تكن إباحة (Al-Ghazālī, المستصفى من علم الأصول, (Ed. Dr. N. al-Suwayd), Vol. 1, p.90.

[176] The literal meaning of *istiṣḥāb* is 'accompanying' in the sense of 'the past accompanying the present' without any interruption or change.

analogy. The educator may here usefully discuss the potential objections to *istiṣḥāb* voiced by those who saw the potential for conflict and disorder in the determination of rulings (due to the ambiguities on what the original state which is presumed to continue by means of *istiṣḥāb* might be) and whether the above procedural rigour of the jurists acts to prevent that.

Despite the limited attention given by the scholars over history to this category, the freedom from the logosphere of the scriptures that *istiṣḥāb* implies (with its various maxims licensing the presumption of permissibility or acceptance[177]) means that this category actually has the potential to form the largest arena for Muslim jurisprudence in the contemporary world.

And here the educator may expand on an interesting implication of the debate on *istiṣḥāb:* its potential to incorporate within its scope the concept of *natural justice*. In areas where there is no specific legislation or ruling, the Qur'ān refers with its various references to '*Enjoin good'* (*amr bil-'urf*) to the basic principles of justice that are upheld by humanity at large, while the Sunna indicates how the Prophet accepted and perpetuated the bulk of the existing social values.

Unconventional scholars such as Ḥasan al-Turābī saw an opening here to expand the concept of *istiṣḥāb* to accommodate the accumulated experience of non-Muslims on the grounds that it is the common product of the *fiṭra* of Mankind created by God,[178] and that there was never an overriding imperative to establish a new way of life in all of its dimensions and details.[179] Human beings may thus utilise everything in the world for their benefit unless they are forbidden by the law in certain specifics. Moreover, the roots of law in the common experience of Mankind mean that it should no longer be considered the exclusive province of religious scholars.[180]

- *DISCUSSION POINT – Non-Sharī'a authority and the validity of change*

In reviewing the tools of *uṣūl al-fiqh* above, the educator can pose the students some thought-provoking questions on the theme of custom and continuity:

Are not the rules of fiqh themselves a product of custom?

The reluctance of the *'ulamā'* in recognising *'urf* as a proof focuses on the difficulty of defining the 'custom' in question and accommodating changes to customs according to time and place. Yet the rules of *fiqh* which are based on juristic opinion, analogy or *ijtihād* have often been formulated in the light of prevailing custom.

- Is it not therefore permissible to depart from them if the custom on which they were founded changes in the course of time? Do not the diverse and contrasting *fatwās* issued by *'ulama'* on similar themes reflect this reality?

[177] The commonly referenced maxims are: الأصل بقاء ما كان على ما كان ('the basic rule is that an issue or rule remains as its original state') الاصل في الاشياء الإباحة ('the default position on matters is permissibility'); اليقين لا يزال بالشك ('a presumed given is not removed by mere doubt'), الأصل براءة الذمة ('the basic starting point is acquittance') and الأصل في الصفات العارضة العدم ('qualifying incidentals without prior proof are not valid').

[178] 'Abd al-Qādir Mahāwāt, تجديد أصول الفقه عند الدكتور حسن الترابي , Sāmī Publications, Algiers 2020, p.183. In theis context the reference is commonly made to the example of the Prophet in his taking the opinion of Salmān the Persian on military matters.

[179] "The meaning of *istiṣḥāb* was that the faith was not revealed to found an entirely new way of life or nullify entirely the pattern of life prior to the appearance of the faith … the principle adopted was that what Mankind was familiar with was to be accepted, but that the Islamic law was revealed to intervene and reform those elements that were wrong" ومغزى الاستصحاب هو أن الدين لم ينزل بتأسيس حياة كلها جديدة وإلغاء الحياة قبل الدين بأسرها…بل كان المبدأ المعتمد أن ما تعارف عليه الناس مقبول وإنما ينزل الشرع ويتدخل ليصلح ما اعوج من أمرهم . Ḥasan al-Turābī تجديد أصول الفقه الإسلامي p.84.

[180] "The principle of *ijmā'* which represents the authority of the Muslim community" ومبدأ الإجماع الذي يُمثل سلطان جماعة المسلمين ; "Free *ijtihād* is not only for scholars, and under certain conditions, but for everyone, for each individual" والاجتهاد الحر ليس للعلماء فقط , وبشروط معينة، بل لكلّ أحد, لكلّ فرد (المحرر, August 2 1994); "Whatever the official qualifications, the majority of Muslims are the arbitrators, the ones to determine who is the most knowledgeable and upright, since there is no church or official authority in the religion to monopolize the issuing of *fatwās*." ومهما تكن المؤهلات الرسمية فجمهور المسلمين هو الحكم وهم أصحاب الشأن في تمييز الذي هو أعلم وأقوم، وليس في الدين كنيسة أو سلطة رسمية تحتكر الفتوى (Ḥasan al-Turābī, تجديد أصول الفقه الإسلامي p.33).

Does not the reality of Muslims across the globe require the validity of change?

Muslim communities, both in the Islamic heartlands and in the diaspora, reflect a considerable pluralism of ideas in blending Islamic elements with cultural elements specific to the environment in which they are living.

- Would denying this diversity by imposing a uniformity conceived in a different environment conflict with the doctrine of *ṣadd al-dharā'i'* by exacerbating tensions with majority non-Muslim communities? [181]

C2.2.8 - The ḥukm shar'i

On the basis of the legal argumentation in the foregoing categories, the educator can thus outline the types of ruling that emanate from the process. After defining the participating constituents (*arkān*) of the judgement – the *Ḥākim shar'ī* (i.e. the Divine Lawgiver); the *maḥkūm alayh* (the person to whom the *ḥukm* – the subject matter of the law under investigation – is addressed) and the *maḥkūm fīh* (the acts, rights or obligations of the *mukallaf*[182] which are to be adjudicated) – the educator can map out in summary for the students the types of legal ruling and the various conditions that affect the ruling, including areas that are susceptible or not susceptible to legal reasoning. This is an important discussion, since it will impact upon the level of success of integrating Islamic law within the jurisdictions of contemporary systems of law for those legal environments that are pursuing this endeavour.

The process of the adjudication in Sharī'a may be divided into two broad procedures: Declaratory Law (*al-ḥukm al-waḍ'ī*) and Defining Law (*al-ḥukm al-taklīfī*).

- The *Declaratory Law* explains the parameters of lawful behaviour or the component elements or principles of legitimate procedure and the rights of the parties – what the law and the regulations 'are'. In this sense, it operates in a manner parallel to Civil Law systems, which have a code of statutes that lay out the laws and which the judge refers to and activates.[183]

But in Sharī'a this has an added dimension since the parameters include a belief system with its sacralised obligations. These are in turn subdivided into

- *Strict Law* (*ḥukm 'azīma*) and *Concessionary Law* (*ḥukm rukhṣa*). The former includes the basic relgiious observations such as *ṣalāh*, *zakāh*, *ṣawm*, the *ḥajj* and *jihād*; and the latter includes attenuating factors to these for reasons of health or security and the like.

- The *Defining Law* details the laws and the level of obligation to them required, according to the nature of the laws. These levels are gradated into the following five categories of ruling (*al-aḥkām al-khamsa*):

    1. Mandatory: (*farḍ* or *wājib*) on the individual level (*farḍ 'aynī*) or on the collective level (*farḍ kafā'ī*);

[181] "Muslims practise Islam in many ways. These are the *'ādāt* that they have developed….It is how a society develops a unique way of living that incorporates Islamic elements as well as specific cultural elements … Even now many American Muslims are developing their own customs and their own ways of doing things that are both American, and also Islamic". (Jasser Auda, *Sharī'ah, Ethical Goals and The Modern Society*, Muis Academy, The Occasional Paper Series, No.10, 2015, p.8).

[182] This is the generic legal term for the defendant/plaintiff/appellant, and means 'the person with full faculties who is capable of being subject to adjudication'.

[183] In Common Law, of course, the concept of Declaratory Law as an unchanging fact is not accepted, since law is considered to be made by judges based on close fitting precedent and adapted to the new case, which becomes the new precedent, a new law. Attempts to define law as something that thus already exists and is to be 'discovered' by the judge have been dismissed as illusory, as "a brooding omnipresence in the sky" (Oliver Wendell, *Southern Pacific Co. v. Jensen 244 U.S. 205, 222*, year 1917) or "childish fiction" (John Austin, *Lectures on Jurisprudence, or, the Philosophy of Law* (J Murray, year 1895), p.321).

2. Recommended (*mandūb* or *mustaḥabb*) or supererogatory (*nafl*)[184], the fulfilment of which earns religious merit (*thawāb*);
3. Neutral (*mubāḥ*) in which the communication from the Lawgiver leaves open the option to do or not to do something;
4. Reprehensible (*makrūh*);
5. Forbidden (*ḥarām* or *maḥẓūr*).

Between Reason and the Text

Having thus covered the basic principles of *uṣūl al-fiqh* and the mechanisms of their application, the educator can engage the students on the implications of a divine 'starting point' for the elaboration of a legal system, and the relationship of the faculty of reason to the elaboration of a legal infrastructure to the emerging civilisation of Islam. This has more relevance than ever today, since the pluralistic nature of contemporary states adds the issue of religious diversity to the debate, at a time when traditional doctrines of the *dhimma*, which would sideline the problem, are falling into disuse. More than ever the mechanisms for the determination of justice are coming under scrutiny.

The legacy of legal thought reveals a highly interwoven relationship between divine revelation and human reason, with each influencing each other at the most fundamental level. Divine revelation was held to tacitly endorse the customary law, but in turn altered the scenery of juridical thought with a new set of responsibilities and human accountability (*taklīf*). Rational argumentation extended its limited scope through analogy, and again tempered this with equitable reasoning towards judgments held to be all the more reasonable.

Reason as handmaiden to the Text

Nevertheless, due to the 'starting point' juristic thought in the formative period of Islamic law could not, and did not, permit the free exercise of reason. It remained subordinate to the divine will in the sense that its function was to seek the comprehension and the implementation of the purposes of Allāh for Muslim society. Under the rules of the Sharī'a, law and justice in the Muslim community are held to derive their validity and substance from the principles and values sanctioned by the *Ḥākim shar'ī,* the Divine Lawgiver.[185] A central ingredient of the legal relationship is the *mukallaf*, who is to possess the faculty to understand the will and command of this Lawgiver. This understanding is made either directly through the explicit Text of divine revelation, or indirectly by means of inference, deduction and *ijtihād*. The exploration above of the categories of *uṣūl al-fiqh* demonstrate this relationship.

The understanding behind this principle of law is that a man cannot be required to do something or to avoid doing it unless the law has been communicated to him in advance, on the grounds of the Qur'ānic statement that *We never punish until We send a messenger.*[186] The implication behind this statement is that reward and punishment are based on the revealed law, not the arbitration of the human intellect (the *'aql*).

Scholars have long debated on whether this unacceptably infantilizes Mankind and removes the functional value of Reason ('*aql*). It certainly differs from the conception of jurisprudence in other legal traditions such as Civil and Common Law, and opens up a whole debate on the relationship between Sharī'a and secularism.

[184] Another term for *mandūb* is *Sunna*, on the basis that the Prophet performed actions that are *sunna mu'akkada* (emphatic) and *sunna ghayr mu'akkada* (supererogatory).

[185] The Qur'ān repeatedly indicates this role by stating that *the decision is for Allah only* (*al-An'ām*, VI: 57) and that *whoso judgeth not by that which Allah hath revealed: such are wrong-doers* (*al-Mā'ida*, V, 45).

[186] Qur'ān *al'Isrā',* XVII, 15.

Reason emancipating from the Text

The debate that the educator can raise here concerns whether Mankind can understand and determine justice by means of intellectual faculty without the aid and mediation of messengers and scriptures. The question under discussion is the following:

- Is the human intellect incapable of ascertaining the law without divine guidance?

The traditionalist view (commonly associated with the *Ashʿarīs*) is that it is not possible for human intellect to determine what is good and evil without the aid of divine guidance. Human reasoning and judgment, it is argued, are liable to err and therefore it is not for the human intellect to determine the values of things which are, instead, to be determined by the Divine Lawgiver. When He permits or demands an act, we know that it is right/good, and when He forbids an act, it is certain that the act in question is wrong/evil. Hence the criterion of right and wrong is *sharʿ,* not *ʿaql.*

The *Muʿtazila* took a different view: that human intellect can indeed judge the criterion of right and wrong without the mediation of scriptures and messengers. However, they attempted to retain the relevance of the divinity by stating that whatever the *`aql* saw as good or right, was also good in the sight of God, and that what the *sharʿ* was doing was simply removing the veil from what the ʻ*aql* could itself perceive; thus in essence the former is identical with the latter. Nevertheless, al-Ghazālī was critical of the *Muʿtazilī* view for its potential to turn the determination of good and evil into a relative matter. He insists instead that

> there are no actions that the *ʻaql* is able either to approve or disapprove without the *sharʿ* affirming them, and the *ʻaql* may only indicate the distinction using its own criterion if it demonstrates a grace that forbids indecency and calls for worship as something that God Almighty has thus enjoined; the *ʻaql* is not able to grasp this independently.[187] [xiv]

There remains, however, the question of the relative weight (quantitatively and qualitatively) of the function of Reason and the function of obedience to the Text. A third position that attempted a compromise between the Muʿtazila and Ashʿarī views was taken by the school of Abū Manṣūr al-Māturīdī, which concluded that right and wrong in the conduct of the *mukallaf* can indeed be ascertained and evaluated by the human intellect, but that

> the rulings of God on the actions of the *mukallafīn* do not by necessity accord with what our intellect can grasp as to what is good or bad in them, because the human intellect, no matter how mature it may be, may err, and because some actions may appear suspect to our minds, There is thus no necessary correspondence between the rulings of God and what Reason can grasp. For which reason the only route to knowing God's ruling is by means of His messengers.[188][xv]

In their compromise, the Māturīdī position (adopted by the Ḥanafīs) was that Good and Bad were perceivable by the intellect but that God was *not* obliged (as the Muʿtazila claimed) to be in necessary accord with these perceptions. They agreed with the Ash'arīs that God's judgment is only known through His messengers, but that what was Good or Bad was *not* defined (as the Ash'arīs claimed) solely by what God had communicated to be so in the Sharīʿa, as opposed to human judgement.

However, the question of the *mukallaf* appears to add an element of ambiguity to this argument in that the difference

> is of no effect except for those who were not informed by the laws of the messengers. As for those to whom the laws of the messengers have reached, the measure of good and ugly actions regarding them is what is stated in their Law, not what their minds understand by their common agreement.[189] [xvi]

[187] Al-Ghazālī, المستصفى من علم الأصول, (Ed. Dr. N. al-Suwayd), Vol. 1, p.90.

[188] ʿAbd al-Wahhāb Khallāf, علم اصول الفقه, Maktabat al-Daʿwā al-Islāmiyya, Shabāb al-Azhar, n.d. p.99.

[189] ʿAbd al-Wahhāb Khallāf, *ibid.*

When al-Ghazālī accepts the principle of *istiṣḥāb*, he acknowledges that the *Sharī'a* does not qualify all human acts or specify either reward or punishment for them before the coming of the Revelation. Thus, these acts remain in the status of the original state of freedom from accountability (*taklīf*). In which case it is Reason, once again, that is to be consulted concerning them.[190]

> ➢ *DISCUSSION POINT – Revelation, Reason and the 'mukallaf'*
>
> The educator can thus initiate a stimulating subject for discussion on the theme of whether the positions taken by the supporters of *'aql* over the supporters of *shar'* have been reconciled. The following questions, for instance, are relevant:
>
> - Is the Muʿtazilī standpoint a religiously unacceptable statement of relativism?
> - How far does al-Ghazālī's argumentation offer a practical, substantive alternative to the Muʿtazilite position that Reason on its own has legislative capacity?
> - Does the Māturīdī compromise represent a coherent position?
> - Since the *terminus post quem* of the *taklīf* is the time of the Revelation ('*until We send a messenger*'), does this imply that the capacity of Reason to judge good and evil is and always has been unlimited, whereas issues of Islamic *taklīf* are not?[191]
> - Is there an essential contradiction between the authority of Reason and the authority of the Text; and if the human intellect determines that something is good or evil, is it imperative that the *ḥukm* of the Lawgiver should be identical with the dictates of reason? What are the implications of the decision either way?
> - If the workings of law depend on assenting to a belief-system (as a *mukallaf*), instead of an appeal to commonly held rationally determined principles, is the authority of law weakened?
> - Does the recourse to the formula: "the only route to knowing God's ruling is by means of His Prophet" constitute an abdication of the discussion?[192]

Reason in conflict with the Text

To extend the question of the prioritisation of a rational as opposed to a textual determination of Law, the educator can follow on the above *Discussion Point* with a conversation on how the legal scholars sought to resolve the instances where there is an outright *conflict* between reason and revelation.

The scholars of the formative period were similarly divided between the poles of Revelation and Reason. On the one hand, representing the wing of thought that such a conflict simply could not exist, Ibn Taymiyya argued that when God granted mankind the faculty of reasoning, and mankind came to perceive that the Revelation contradicted with rationality, this indicates that they either did not do enough reasoning or they did not understand the Revelation.[193] On the more rationalist wing, Ibn Rushd in his work *The Decisive Treatise on the harmony between*

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[190] On this, see A. Ḥammād, *Abū Ḥāmid al-Ghazālī's juristic doctrine in al-Mustaṣfā min 'Ilm al-Uṣūl, Vol. I*, Dissertation thesis, University of Chicago, March 1987. [Mustasfa translation 1] pp.20-21.

[191] Al-Ghazālī identifies the role of Reason as an identifier of *Sharī'a* rules, not an originator of them. (A. Ḥammād, *ibid.*)

[192] Ibn Taymiyya's attempt to explain the conundrum also abdicates the discussion: "Reason is perfectly capable of apprehending worldly benefit and harm (*maṣlaha aw mafsada*) even if, in the absence of indications by the religious law, such judgements could not guarantee reward or punishment in the Hereafter." أن يكون الفعل مشتملا على مصلحة أو مفسدة ولو لم يرد الشرع بذلك كما يعلم أن العدل مشتمل على مصلحة العالم والظلم يشتمل على فسادهم فهذا النوع هو حسن وقبيح وقد يعلم بالعقل والشرع ... لكن لا يلزم من حصول هذا القبح أن يكون فاعله معاقبا في الآخرة إذا لم يرد شرع بذلك Ibn Taymiyya, مجموع الفتاوى Vol.8, pp.434-435.

[193] Ibn Taymiyya's argument is expounded in his multi-volume درء تعارض العقل والنقل ('*Averting the Conflict between Reason and Tradition*') Ed. M.R. Sālim, 1411/1991.

philosophy and the Sharīʿa argued for the resort to allegorical interpretation of the Text if the Text contradicted real life experience:

> If Scripture so expresses it; the apparent (*ẓāhir*) meaning of the words must either accord or conflict with what it evidences. If this apparent meaning accords there is no argument. If it conflicts there is a call for allegorical interpretation of it... we affirm definitely that whenever the evidential meaning is in conflict with the apparent meaning of the words of the Text, that apparent meaning admits of allegorical interpretation, according to the rules for such interpretation in Arabic.[194] [xvii]

Another resolution of the conundrum was to confine the operative arena of human reason to areas of law that did not impinge upon what were more strictly the 'rights of God' (*ḥuqūq Allāh*) as represented by the acts of devotion and worship (*al-ʿibādāt*), the acts of financial liability (tithes on crops and *kharāj* tax on conquered lands) and the *ḥudūd* penalties and penances. The faculty of reason, it was argued, cannot determine the virtue, for instance, of fasting on the last day of Ramaḍān or the shamefulness of fasting on the day which follows it. The good and evil in this case can only be determined by *sharʿ* not by *ʿaql*.[195]

- *DISCUSSION POINT – Resolving the conflict between Text and Reason*

The educator can pose some interesting questions in this context on how this borderline between rationality and religious authority has been negotiated in Islamic law.

- Is the negotiation between rationality and religious authority objective, or wilful?
- Is the resort to allegorical interpretation textually justified?
- How does one evaluate the position taken by contemporary Sharīʿa scholars, that the original Qurʾānic text or a Prophetic tradition must be allowed to be reinterpreted in a way 'that allows the rational intellect to rule'?
- Does the rational understanding (in the matter of variables, not in the matter of the fixed issues in the Sharīʿa) have 'higher ground over the original scriptures that give an apparent (*ẓāhir*) meaning'? [196]
- Does this indicate that, outside the arena of the *ḥuqūq Allāh* scripture can never be as important as the use of one's rational faculties for determining truth?
- What are the implications, both intellectually, and in terms of the application of law, of such a prioritisation?[197]

Questions such as the above are important in that they set the parameters for discussion on the possibilities ultimately of a co-existence between Sharīʿa and the legal systems operating in the modern state.

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[194] Ibn Rushd, فصل المقال فيما بين الحكمة والشريعة من الاتصال Chapter Two, sections: موافقة الشريعة لمناهج الفلسفة and التوافق بين المعقول والمنقول. He argued that "there will invariably be found among the expressions of Scripture something which in its apparent meaning bears witness to that allegorical interpretation or comes close to bearing witness" وُجد في ألفاظ الشرع ما يشهد بظاهره لذلك التأويل أو يقارب أن يشهد

[195] See M. Al-Shawkānī, فكحسن صوم آخر يوم من رمضان وقبح صوم الذي بعده فإن العقل لا طريق له إلى العلم بذلك لكن الشرع لما ورد علمنا الحسن والقبح فيها إرشاد الفحول إلى تحقيق الحق من علم الأصول Ed. Abū Ḥafṣ Sāmī ibn al-ʿArabī, Dār al-Faḍīla, Riyādh, 1st ed. 1421/2000, Vol. 1 p.79.

[196] Jasser Auda, *Sharīʿah, Ethical Goals and The Modern Society*, Muis Academy, The Occasional Paper Series, No.10, 2015, pp.17-18.

[197] Ibn Rushd's argument on this conundrum was to avoid posing the possibility of an inner meaning to those with only the capacity to understand apparent meaning: "Allegorical interpretations, then, ought not to be expressed to the masses … and with regard to an apparent text, when there is a self-evident doubt … they should be told that it is ambiguous and its meaning known by no one except God; and the stop should be put here in the sentence of the Exalted: *And no one knows the interpretation thereof except God*". فالتأويلات ليس ينبغي أن يصرح بها للجمهور ولا أن تثبت في الكتب الخطابية أو الجدلية. ... انه متشابه لا يعلمه إلا الله، وأن الوقف يجب ههنا في قوله تعالى: "وما يعلم تأويله إلا الله". Ibn Rushd, فصل المقال فيما بين الحكمة والشريعة من الاتصال Chapter Two, section: لا يجوز أن يكتب للعامة ما لا يدركونه من أباح التأويل للجمهور فقد أفسده

Module C2.3 – THE LIMITATIONS OF THE CLASSICAL LEGAL MODEL

Having outlined the mechanisms of *uṣūl al-fiqh*, the educator can proceed to examine with the students the developments of Islamic legal theory over history. He can illustrate the two opposing tendencies that influenced the development of the body of law: the '*materialist'* tendency that argued that it was the material content of the law which is of prime importance rather than the formal mechanisms of its creation, and the *'formalist'* tendency where the framework in which norms are created took precedence

C2.3.1 – The narrowing of the ijtihād endeavour

In unit *2.3.1* the educator can trace how during the first two and half centuries of Islam the elaboration of law was 'materialist' insofar as no attempt was made to deny a scholar the right to find his own solutions to legal problems. But over time and with the attendant changes in culture, the plausibility of the materialists' tendency of jurisprudence was necessarily weakened in favour of the formalism that attracted the majority of the jurists[198]. The educator can illustrate this process in the progressive streamlining, and later narrowing, of the *ijtihād* endeavour that took place after the period of the establishment of the four major schools of law. From about the middle of the third/ninth century, the idea began to gain currency that only the great scholars of the past had enjoyed the right to practice *ijtihād*.

The reasons for this can be explored, such as the problems posed by the profusion and contradictory nature of the legal texts and interpretations based upon them. In the absence of a fully accepted mechanism of precedent, some method was required to identify the most widespread or recognised ('*mashhūr'*) opinion on any given point, one that could evaluate an opinion's relative strength and establish a hierarchy of authority among the leading exponents of a particular school of law.[199]

In the fifth/eleventh century, scholars began to categorise *ijtihād* into several categories in a bid to impose some parameters and restrictions on the practice. Al-Ghazālī noted that by his era (the 2nd half of the 11th century) independent *mujtahidūn* thinkers were already extinct[200] and to justify this went on to divide *ijtihād* into two categories: 'independent *ijtihād'* (the *mujtahid f al-shar',* deducing the law directly from the evidence in the sources) and 'limited *ijtihād'* (elaborating and implementing the law within the confines of a particular school).[201] While there were no 'regulations' enforcing this division the tendency was well advanced so that there emerged categories of scholars less inclined to original speculation due to the considerable demands that would be required of them.[202]

Classes of 'imitators' accordingly emerged of varying degrees of initiative – the *aṣḥāb al-takhrīj* ('promulgators' who indicated which of the various views of the *mujtahidīn* would apply to a specific condition), the *aṣḥāb al-tarjīh* ('preferrers' competent to make comparisons and distinguish the preferable views) and the *aṣḥāb al-taṣḥīḥ* ('verifiers' trained in distinguishing the manifest meanings from the rare and obscure meanings), and finally the *muqallidūn* ('the repeaters' or 'blind imitators' whose practice of simply amassing the judgements of others was uncritical).[203] From the 12th to the 15th centuries Islamic legal doctrines progressively stabilised

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[198] For a treatment of the polarities between 'formalism' and 'materialism' in the development of Islamic law, see Aron Zysow, *The Economy of Certainty, An Introduction to the Typology of Islamic Legal Theory*, Lockwood Press, 2013.

[199] The process of evaluation of the hierarchy of authority was termed *takhṭi'a* ('fallibilism') and allowed the evaluator to determine that while one jurist was correct, the others could be justified but wrong in their *ijtihād.* One could thus accept their existence without accepting that they all were right and that the truth was multiple, thus avoiding destructive rifts in the school.

[200] قد خلا العصر عن المجتهد المستقل See M. Al-Shawkānī, إرشاد الفحول إلى تحقيق الحق من علم الأصول Ed. Abū Ḥafṣ Sāmī ibn al-'Arabī, Dār al-Faḍīla, Riyādh, 1st ed. 1421/2000, Vol. 2, p.1037.

[201] Wael Hallaq notes that the terminology describing these types (*muṭlaq*, *muntasib*, *muqayyad*) was confusing, leading to confusion among the jurists themselves. See W. Hallaq, 'Was the Gate of Ijtihad Closed', *International Journal of Middle East Studies*, Vol. 16, No. 1 (Mar., 1984), p.25.

[202] Wael Hallaq gives an indication of these demands (W. Hallaq, *Op. cit.*, p.6).

[203] Kamali, *op cit*, *online text* , pp.333-6.

and institutionalised, as scholars acquiesced to the industry and comprehensiveness of their forbears, and compiled comprehensive manuals or 'abridgements' (*mukhtaṣars*) to aid their contemporary jurists. The role of the *madhhab* came to be structurally entrenched and offered salaried and prestigious teaching posts to scholars based on their *madhhab* identity.

C2.3.2 – On the 'closure of ijtihād'

The effect of this standardisation has been much discussed, and in unit *2.3.2* the educator can introduce the student to lively ongoing debates on the 'closing of the gates of *ijtihād'*. As mentioned earlier, the starting point in Islamic legal theory was that *ijtihād* was an obligation either on the individual or on the societal level and therefore may never be discontinued,[204] while the categories of *ijmā'* and *qiyās* all presuppose it.[205] Yet the narrowing of the *ijtihād* endeavour is observable, and the scholars' explanations of the reasons for this vary between an instinct for consistency and intellectual stagnation.[206] Much of the impression on stagnation, some argue, was that the production of *mukhtaṣars* became sources in their own right, with commentaries upon commentaries of them populating the labours of centuries, much of it necessarily repetitive of earlier works. The educator can pose the questions of whether this could be seen as 'lack of originality' or alternatively as a 'desire for consistency'.

A further view is that *muqallidūn* scholars came to predominate out of an instinct to appropriate the established authority of the earlier tradition in order to legitimize their own interpretations, and then use this authority to maintain independence from political interference. Political considerations did exercise considerable pressure,[207] which the educator can illustrate by relevant examples, and the desire for administrative stability influenced the requirement to base rulings strictly according to the doctrines of the particular school patronised by the state. By the time of the Mamluks, judges and *muftīs* could be disciplined for diverging from the accepted rulings of their *madhhab*s, and deviant verdicts could be overturned. [208]

The narrowing of the endeavour is thus admitted by all scholars, but the educator can stimulate discussion on how the issue of 'closure', according to recent scholarship, is actually sceptically received, with some scholars indicating that it was only *ijtihād* at the level of fundamental points of *uṣūl,* or the foundation of separate schools of legal thought, that was closed off.[209] Legal activity continued uninterrupted, but this was in the form of *fatwās* that focused on developing positive law responses to the demands of the moment.[210] The case for the decline in *ijtihād* thus appears more a matter of statistics, and a result of historical developments, rather than due to a juridical principle.

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[204] The legal theory was supported by *aḥādīth* that absolved the *mujtahid* who committed an error from the charge of sin and even entitled him to a spiritual reward. Cf. *Sunan Abī Dāwūd* 3567: "If a judge passes a judgment having exerted himself to arrive at what is correct, and he is indeed correct, he will have two rewards. If he passes judgment having exerted himself to arrive at what is correct, but it is incorrect, he will have one reward." "إِذَا حَكَمَ الْحَاكِمُ فَاجْتَهَدَ فَأَصَابَ فَلَهُ أَجْرَانِ وَإِذَا حَكَمَ فَاجْتَهَدَ فَأَخْطَأَ فَلَهُ أَجْرٌ"

[205] Kamali, *op cit, online text* , p.334. The Shīʿa, for instance, exercise *ijtihād* continually, but on condition that they adhere, both in principle and in detail, to the rulings of the Imams. In the absence of any such ruling, the Shīʿa recognise `*aql* as a proof following the Qur'an and the *Sunna*.

[206] The first appearance in history of the debate on the closure appears to be in the work of the Ḥanbalī jurist Ibn 'Aqīl in his *Kitāb al-Funūn*, where he responds to a question posed by a Ḥanafī jurist: "Where are the *mujtahids*? This issue closes the gate of judgeship". See W. Hallaq, *Op. cit.*, p.21.

[207] "Since the measures contemplated by the ruler were considered illegal, religious scholars were put in an awkward position. Indeed, by providing an opinion which would favor the upholding of the law they would clearly oppose the ruler's wishes and thus run the risk of incurring the ruler's wrath. Few of them would take this risk if the ruler's actions threatened their self interest." L. Fernandes, 'Between Qadis and Muftis: To Whom Does the Mamluk Sultan Listen?' *Mamluk Studies Review* 6 (2002), p.100.

[208] L. Fernandes, *Ibid.*

[209] Wael Hallaq interprets a comment by the 7th/13th century Shāfiʿī jurist al-Rāfʿī that "Muslims seem to agree that at present there are no *mujtahids*" as meaning independent *mujtahids* who can found schools of law. "It would be implausible to assume", he insists, "that al-Rāfʿī meant 'limited *mujtahids'* because such an assumption contradicts the reality of his time" (W. Hallaq, *Op. cit.*, p.26).

[210] W. Hallaq, *Op. cit.*, p.18.

Nevertheless Muslim scholars from the 7th/13th century onward (with the exception of the Ḥanbalīs)[211] acceded to the view that independent *ijtihād* had practically discontinued, and justified the predominance of *taqlīd.* The tide of professional and public opinion turned against the jurists who attempted *ijtihād*, and the idea became progressively accepted. The educator can here illustrate the views of scholars and historians of the more recent period, who strongly deplored this tendency as "intellectual laziness which, especially in the period of spiritual decay, turns great thinkers into idols"[212] and who argued that, contrary to the prevailing assumption, *ijtihād* is actually easier than ever to perform on the grounds that

> anyone with the least understanding knows that God has actually made *ijtihād* much easier for those who came later than for those who preceded them, since the number of commentaries written on the Qur'ān and the Sunna are now numerous beyond counting. There are commentaries and evaluations of the soundness of ḥadīths that are more than enough to meet the *mujtahid's* needs.[213] [xviii]

For other scholars, calling a halt to *ijtihād* was moreover nothing less than an impiety.[214] The problem, which the educator can place emphasis on, was that these contemporary scholars were lamenting the cultural and religious conservatism that supported *taqlīd* (or the promulgation of *fatwās* construed within the traditional parameters). They deplored the prioritisation of the 'formalist' mode of legal thought, with respect to the *theory* of law, which was making adaptation to the types of changes that were foreign to the heritage difficult.

C2.3.3– The de facto sidelining of Islamic law

Historians of Islamic law note the tension between theory and practice (*ʿāda, ʿurf*), between jurisprudence and customary law, which existed in Islamic law from its very beginnings. While the early jurisprudential specialists formulated their doctrine often in opposition to Umayyad popular and administrative practice, the early ʿAbbāsids who posed as the truer protagonists of Islam were unable to carry the whole of the nascent Muslim society with them.

The problem was that the emerging Sharī'a disciplines could not abandon their claim to exclusive theoretical validity and recognise the existence of an autonomous customary law. Moreover, its representatives – the *'ulamā'* – were uniquely qualified to interpret the religious conscience of the Muslims and thus retained enormous prestige and authority.

In response, the ʿAbbāsids recognised the influence of the *'ulamā'* but retained the authority to appoint them. Sooner or later the doctrinal independence of the *'ulamā'* was compromised by their reliance on the political authorities for the execution of their judgments. Rigidity in the application of Sharī'a theory was incompatible with the demands of governing a multi-cultural, politically variegated Islamic empire. Responding to the inadequacy of the system to deal with criminal cases, Muslim rulers consequently devised ways progressively to inject degrees of flexibility into the system of Islamic jurisprudence,[215] often through a form of creative

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[211] Their doctrine that *ijtihād* in all of its forms remains open and that no period may be without a *mujtahid* was countered by the Ḥanafīs, the Mālikīs, and some Shāfi'īs (W. Hallaq, *Op. cit.*, p.22).

[212] M. Iqbal, *The Reconstruction of Religious Thought in Islam,* Ed. M. Sheikh, Stanford University Press, California, 2012, p.141.

[213] Muhammad Iqbal considers this objection to be already ancient, and is here quoting from Badr al-Dīn al-Zarkashī's البرهان في علوم القرآن . Al-Zarkashī died in 794/1392. See M. Iqbal, *Op. cit.*, p. 141 (more details in his note 57).

[214] "We do not know how anyone can be justified in closing a door that God Almighty has opened to people's minds, and if anyone were to say that, where has he found the evidence for this?" ولا نعرف ان أحدا يسوغ له ان يغلق بابا فتحه الله تعالى للعقول , فإن قال ذلك فمن أي دليل أخذ (Muḥammad Abū Zahra, أصول الفقه n.d. p.399 (paragraph 385). "Whosoever confines the grace of God to some of his creation and limits the understanding of this purified law to those who preceded his era, has in fact dared to impinge upon God Almighty and His Sharī'a … Is this anything other than an outright abrogation? Glory be, this is a monstrous defamation!" ومن حصر فضل الله على بعض خلقه وقصر فهم هذه الشريعة المطهرة على من تقدم عصره فقد تجرأ على الله عز وجل ثم على شريعته … وهل النسخ إلا هذا، سبحانك هذا بهتان عظيم (M. Al-Shawkānī, إرشاد الفحول إلى تحقيق الحق من علم الأصول Ed. Abū Ḥafṣ Sāmī ibn al-'Arabī, Dār al-Faḍīla, Riyādh, 1st ed. 1421/2000, Vol. 2 p.1041).

[215] "An uneasy truce between the *'ulamā'* ('scholars'), the specialists in religious law, and the political authorities came into being…[the *'ulamā'*] formulated the doctrine that necessity (*ḍarūra*) dispensed Muslims from serving the strict rules of the Law … As long as the sacred Law received formal recognition as a religious ideal, it did not insist on being fully applied in practice" (J. Schacht, *An Introduction to Islamic Law* , Clarendon, Oxford 1982, p.84.)

'alternative interpretation', the appeal to *ḍarūra* ('overriding necessity') and ultimately the obligation – Qur'ānicly mandated – to obey the established authority.[216]

In unit *C2.3.3* the educator can elucidate how, effectively, a double-system administration of justice came into being, whereby the administration of the greater part of criminal justice was taken over by the police (*shurṭa*).[217] Similarly, *maẓālim* courts hearing complaints against officials were presided over not by the *qāḍī* but by the *ṣāḥib al-maẓālim* – the overseer or superintendent of the court who was appointed by the sovereign. The competence of the *qāḍīs'* tribunals progressively became restricted to matters of family law, inheritance, and *waqf*.

The Ottoman Empire, for instance, illustrates this bifurcation between religious and secular instruments well. In the Ottoman system the administration of law was mediated via Sharī'a and *kānūn* (the sulṭānic law of the *Kānūnnāmeh*). The doctrinal influence was restricted in scope, but not absent, from the *kānūn* or *maẓālim* courts, since the idea that law must be ruled by religion remained an essential assumption. Otherwise, without at least the traces of Sharī'a attached to their adjudications, as underpinned by the principles of *uṣūl al-fiqh* and *maṣlaḥa*, individual Muslim litigants could justifiably ignore them.[218]

Thus, in retrospect, it becomes clear that Sharī'a never actually became the sole, changeless, dogmatic law that most medieval theorists intended it to be and the state as envisaged by the theory of Islamic law remained a fiction which never existed in reality.[219]

> ➢ *DISCUSSION POINT - The true nature and function of the uṣūl al-fiqh*
>
> Referring back to the *Discussion Point* at the definitions of *uṣūl al-fiqh* (unit *C2.1.1*) the educator can here engage the students in a discussion on whether the *uṣūl al-fiqh* historically, constituted a pro-active or a reactive discipline. He may present the position, for instance, of Wael Hallaq who argued for what might be termed the 'practicality' of *uṣūl al-fiqh.* For Hallaq, *fiqh* and social reality are intimately linked, mediated by deriving practical law from the scriptural sources, and thus creating a seamless coherence between the *uṣūl* and the implementation of law.
>
> This constrasts with other scholars who argued that the *uṣūl al-fiqh* served to justify existing *fiqh*—that is, they were retrospective rather than theorising and establishing a new law, or as some scholars maintain, they constituted an exercise in 'theologizing' the *fiqh*—that is, making it more than simply law and linking it to the Revelation texts. The educator may usefully iniatiate a discussion on the position taken by Rumee Ahmed, that the debate on Islamic law is needlessly complicated by the influence of 'the secular and quasi-secular legal systems of the modern day, in which law is associated with governance'. Instead, Ahmed indicates:
>
> - Islamic legal texts, and especially works of legal theory, should not be judged in light of their practical application;
> - The texts themselves are primarily products of religious devotion, not of policy-making.[220]

[216] يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ *O you who believe! obey Allah and obey the Messenger and those in authority from among you* [Qur'ān, IV (*al-Nisā'*) 59] and elsewhere.

[217] On this, see Ignáz Goldziher & Joseph F. Schacht, '*Fiḳh*', in Bernard Lewis, Charles Pellat, & Joseph Schacht (eds.), *The Encyclopaedia of Islam, New Edition, Volume 2: C-G* (Leiden, The Netherlands: Koninklijke Brill N. V., 1965), pp.890-891.

[218] Works on *ʿamal,* on *ḥiyal*, and on *shurūṭ*, which form an important branch of Sharī'a productivity in the Ottoman system, evidence this presence.

[219] J. Schacht, *An Introduction to Islamic Law* , Clarendon, Oxford 1982, p.76.

[220] R. Ahmed, *Narratives of Islamic Legal Theory*, Oxford Islamic Legal Studies, OUP, 2012, pp.152-7.

The educator can explore with the student an evaluation of these two poles of interpreting the function of Islamic legal thought. The interpretation appears to have depended on the level of deference to the structure provided by the tradition, or the creative use of this tradition. That is:

a) law as an emulative enterprise giving jurists the ability to factor context into their decisions, or

b) law as an imitative enterprise requiring jurists to adhere to inherited injunctions whenever possible.[221]

Islamic law as a theoretical speculation, a scholarly discourse

The historically 'theoretical' nature of Islamic law, as some contemporary scholars maintain it, opens up avenues of discussion on a deeper level that the educator can explore with the students. Should Islamic law, for instance, be understood primarily as 'theology-in-use' or 'juridical theology'?[222] And was the *uṣūl* endeavour pre-occupied with establishing the beauty and intellectual coherence of the system rather than its practicality? Sharī'a law, in Wael Hallaq's definition, was primarily a process of explicating doctrine,

> an intellectual engagement to understand all the possible ways of reasoning and interpretation pertaining to a particular case. It was not the case that was of primary importance, but rather the principle that governed a group of cognate cases. … Their law was an interpretive and heuristic project, not a body of rules of action or conduct prescribed by a controlling authority … the law was an ijtihadic process, a continuously renewed exercise in interpretation.[223]

This perception explains how Muslim legal thinking is imbued with *religious* concerns.[224] But since, historically, the ultimate legal authority was always with the local *sulṭān* and his administration, and the state's administration of the law did not automatically reflect Muslim practice, the record of the development of Islamic law reveals an endeavour of élite groups of scholars debating the law within and amongst the *madhhab* corridors. The reality of the lived community was often peripheral to these debates. Since the *'ulamā'* were not directly involved in the workings of the state, Rumee Ahmed argues,

> they primarily concerned themselves with articulating an ideal, rarified law … Thus, Islamic legal discussions were highly theoretical, and addressed legal situations that might never have occurred… instead they presented arguments for what Muslims were *supposed* to do. In this rarified discourse, Muslim jurists were more interested in the coherence of their doctrines than in their impact on Muslim communities.[225]

With the notion of the Sharī'a as the comprehensive and preordained system of God's commands – a system of pure law having an existence independent of society – Islamic jurisprudence became essentially an introspective science, concerned with the elaboration of the pure law *in abstracto*. Ibn Khaldūn (d. 784/1382) noted this problem in his *Muqaddima*, where he criticised

[221] Rumee Ahmed characterises the poles as represented by two pre-modern Ḥanafī scholars: Abū Zayd ʿUbayd Allāh b. ʿUmar al-Dabūsī (d. 430/1039) and Muḥammad b. Aḥmad b. Abī Sahl al-Sarakhsī (d. 483/1090). See R. Ahmed, *Narratives of Islamic Legal Theory*, Oxford Islamic Legal Studies, OUP, 2012, p.155.

[222] George Makdisi, "Classical Islam and the Christian West," in *Religion and Culture in Medieval Islam*, eds. Hovannisian and Sabagh (Cambridge: Cambridge University Press, 1999), p.7.

[223] Wael Hallaq, *An Introduction to Islamic Law*, Cambridge University Press, Cambridge, New York, 2009, p.166.

[224] Aron Zysow, *The Economy of Certainty, An Introduction to the Typology of Islamic Legal Theory*, Lockwood Press, 2013, p.xiv-xv.

[225] R. Ahmed, *Islamic Law and Theology*, in A. Emon and R. Ahmed (edd), *The Oxford Handbook of Islamic Law*, Oxford University Press, 2018, pp. 116-117 and.119.

the theological current that came to populate later *uṣūl al-fiqh* scholarship[226] and which effectively turned an increasingly academic discipline into 'a religious ritual enacted by pious practitioners'.[227]

A useful focus of discussion for the educator, pending a more detailed discussion later in the programme, is how contemporary scholars have argued that this historical detachment from reality on the ground has the potential today to free up legal thought to adapt itself to a new environment that did not exist at the time of the major jurisprudiential endeavour.[228] But as contemporary Muslim commentators have lamented, it also had the potential to generate theoretical absurdity.[229]

[226] "Ibn Khaldūn argues that many jurists began to focus on *uṣūl*, which for them became more interesting because of its difficulty and the challenge of its theoretical questions, and elevated it to a status equal with that of *fiqh*. Thus, according to Ibn Khaldūn, what began as a way to spend idle time became the focus of academic activity." R. Kevin Jaques, *Authority, Conflict, and the Transmission of Diversity in Medieval Islamic Law*, Brill 2006, pp.201-2.

[227] R. Ahmed, *Narratives of Islamic Legal Theory*, Oxford Islamic Legal Studies, OUP, 2012, pp.152-7.

[228] "It is perhaps therefore a strength that legal theory is somewhat divorced from social application, because it allows for legal theorist and reader alike to transcend the strictures of lived reality into a world of possibility while keeping one foot grounded in the communal discourse and inherited jurisprudence of the world as it is. Revisiting legal theory texts with this background in mind will allow scholars to uncover myriad conceptions of Islam and Islamic law that are as diverse as the legal theorists who articulate them." R. Ahmed, *Narratives of Islamic Legal Theory*, Oxford Islamic Legal Studies, OUP, 2012, p.158

[229] The 2015 controversy in Egypt over the discovery of al-Azhar textbooks being taught that include passages on the permissibility of eating non-Muslim and apostates' flesh, is an example of the pursuit of Sharī'a study as a theoretical exercise, divorced from reality. See, for instance, Imām al-Sharbīnī's الإقناع فى حل ألفاظ أبى شجاع Vol. 2, p.562: وله (للمحارب المسلم) قتل مرتد وأكله، وقتل حربى ولو صغيراً أو امرأة وأكلها، لأنهما غير معصومين، وإنما حرم قتل الصبى الحربى، والمرأة الحربية فى غير الضرورة لا لحرمتهما بل لحق الغانمين. ("[The Muslim warrior] has the right to kill an apostate and eat him, and to kill and eat a *ḥarbī* (enemy combatant), even a young child or a woman, because they are not inviolable. But it is forbidden to kill a *ḥarbī* boy, and a *ḥarbī* woman when it is not necessary, not because of their inviolability but rather because this right belongs solely to those who took them as war booty.") Another example from the same work is the فصل في الاستنجاء ('*Section on Cleansing Oneself after Defecation'*) detailing conditions allowing for the use of Christian holy books or works of philosophy and logic as toilet paper. See Vol. 1, pp.154-5: ومن المحترم ما كتب عليه اسم معظم أو علم كحديث أو فقه ... أما غير المحترم كفلسفة ومنطق مشتمل عليها ... التفصيل يحمل إطلاق من جوزه وجوزه القاضي بورق التوراة والإنجيل وهو محمول على ما علم تبديله منهما وخلا عن اسم الله تعالى ونحوه ... بخلاف جلد المصحف فإنه يمتنع الاستنجاء به مطلقا ("What must be considered as papers 'to be respected' are papers on which the name of the Exalted One is written or scholarly texts of *Hadīth* or *Fiqh* … non-'respectable' [paper] is that such as where philosophy and logic is implicated in them … The Qāḍī [probably al-Qāḍī Abū al-Tayyib bin 'Abd Allāh bin Tāhir bin 'Umar al-Tabarī al-Shāfi'ī] permitted [cleansing oneself] with paper from the *Torah* or the *Gospel*, this being tolerated if there is no available substitute for either of them, and provided it be free of the mention of God Almighty's name or suchlike … as opposed to a volume of the *Muṣḥaf*, whose use for cleansing oneself is absolutely forbidden.")

COURSE C3 – THE CONTEMPORARY LEGAL ARENA

Module C3.1 – THE CLASH AND THE AMALGAM

C3.1.1 – The developmental gap – the merging of Islamic with European law

We have seen that the notion of the end of *ijtihād* is erroneous (see unit *C2.3.2*), and that scholars throughout the latter period did practice *ijtihād* within the confines of the system in areas not covered by the *maẓālim* courts. As relations with Muslim states intermeshed with European states under conditions of trade or colonial domination, the issues of legal consistency, the removal of arbitrariness and legal equitability between subjects of different faiths inevitably raised themselves. The relative isolation of the Muslim world under the centuries of Ottoman domination revealed a state of uneven legal development. [230]

As the pressures and contradictions intensified, a number of reforms were undertaken. In 1839 the Ottoman *Gülhane Decree* was enacted under the perception that 'it was necessary and important that new laws be enacted and that the main subject matters of these necessary laws be security of life and protection of virtue, honour and property'. The Penal Code that resulted from this aimed at restricting the arbitrariness of justice under the *siyāset* legal arena.[231] Legal sanction and punishment was no longer left to the discretion of the Sultan or high officials, but had to be awarded by administrative councils in accordance with the law.[232]

Egypt's promulgation of the *Qānūn-I Cedīd,* ('the New Code') in 1850 was similarly constructed, and in either case they allowed a parallel, simultaneous court hearing system whereby some offences were to be adjudicated according to the code, some according to the Sharī'a and some to both. Over the period of the 1820s-1870s *siyāsa* adjudication progressively increased its influence to oversee and supplement the Sharī'a court system. After a ruling had been made by the Sharī'a court, it would be referred to the *siyāsa* court or council which had the authority to re-examine the case using, not spoken evidence, but physical, forensic evidence.

As European ideas of nationhood and nationalism became implanted among the various non-Muslim subjects of the Ottoman sultans, the anomaly of gradated rights came into focus, particularly since non-Muslims were at a disadvantage, especially as their testimonies against Muslims were not admitted. To remedy this, the Ottoman government created mixed criminal courts to deal with crimes in which foreigners or non-Muslim Ottoman subjects were involved. The most important innovations were that non-Muslim judges could sit on these courts and that non-Muslim witnesses could be heard. If the defendant was a foreigner, half of the judges were also foreigners.

The development illustrates the advancing influence of secular systems of law, to a progressive restriction of the powers of the Sharī'a adjudicators until the promulgation of openly European-inspired codes. Signal markers of this process were the Ottoman Penal Code (*Mecele*) of 1858

[230] An example of the uneven development was the question of slavery. The slave trade, which in the United Kingdom had existed from 1560, was formally outlawed in 1807, enforced since 1808 by the 'West Africa Squadron' and fully abolished by the 1834 *Abolition of Slavery Act*. European nations followed this abolition over the next decades.The Ottoman Empire criminalized slavery in 1871, enforcing the ban in 1890 with the *Brussels Conference Act*. Egypt abolished slavery in 1895, and abolitions in the Muslim world followed: 1927 (Nejd and HIjaz), 1929 Persia, 1937 Bahrain, 1949 Kuwait, 1952 Qatar, 1956 Trucial States (Abu Dhabi in 1963), 1961 Morocco (other than domestic slavery), 1962 Saudi Arabia and North Yemen, 1967 South Yemen, 1970 Oman, 1981 Mauritania (ban not fully enforced). The delay had much to do with the ambiguous scriptural evidence on slavery upon which the development of law in Islam depends. The current traffic on *Fatwā* sites on the internet asking clarification on this issue demonstrates the lasting effects of this ambiguity, and is another example of the theoretical 'scholarly discourse' function of Islamic jurisprudence (see unit *C3.1.3* above).

[231] In the 19th century the term *siyāsa* referred to the Ottoman secular court system that complemented the religious Sharī'a courts in that while the Sharī'a courts could only bring a verdict if the next-of-kin demanded it or there was uncontrovertible evidence from witnesses, the *'siyāset'* system of courts and rulings regulated offenses against the government (typcially cases of bribery, embezzlement and misuse of power).

[232] On this, see R. Peters, *Crime and Punishment in Islamic Law, Theory and Practice from the Sixteenth to the Twenty-first Century*, Cambridge University Press, 2005, pp.127-8.

patterned after Belgian and French codes, and the contemporary Egyptian *Al-Qānūnnāme al-Sulṭānī* (Sultanic Code), also called *al-Qānūnnāme al-Humāyūnī* (Imperial Code) which remained in force until 1883, when the French inspired Penal Code was promulgated.[233]

Scholars and historians of Sharī'a note the fundamental transformations that took place in the jurisprudential arena not only in terms of the reduction of status of Sharī'a law in the amalgam, but also in the nature of this Sharī'a law. The promulgation of codes had an important influence on the Sharī'a ingredients that were incorporated. As Wael Hallaq explains, the process of entexting the Sharī'a, under the drive towards codification, had the effect of severing nearly all its ties with its anthropological and sociological legal past:

> Once the anthropological past was trampled under by an entexted Shariʿa, the very meaning of Islamic law was severely curtailed, if not transformed … The act of severance … was almost perfectly correlated with the process by which the surviving residue, the entexted body of Shariʿa, was transplanted into a new environment. [234]

As a result the Shariʿa's institutional structures were progressively dismantled, the training opportunities of Muslim legists severely curtailed, as a new conception of law and new legal and cultural systems – centralised, codified and homogenised – took their place. [235]

C3.1.2 – Qānūn as the default process of contemporary law

In the light of these historical developments, in unit *C.3.1.2* the educator can discuss with the students how within this amalgam the mechanisms of Sharī'a law are not strictly speaking obsolete or contradicted. Moreover, the educator can address the argument, which has been made, that the twin legal valencies of *Sharī'a* and *Qānūn*, which was the reality throughout Islamic history and only formalised by the modern amalgam, has a justified logic to it: *Sharī'a* focusing on the ethics of the individual and the society as a whole, and *Qānūn* focusing on the enforcement by the state of criminal sanctions. The difference between the arenas of the *Sharīʿah* and the *Qānūn* may thus, in Islam, be attributed to the difference between the arenas of 'sin' and 'crime'. [236]

In this respect, the Sharī'a might be considered to actively support the prioritisation of modern legislation and modern systems of law. This point has been made by several scholars, who note that the historical adoption of the tools of *ijmā', qiyās, istiḥsān, al-maṣāliḥ al-mursala* and others, demonstrates the right of Islamic societies to enact legislation appropriate to their conditions within the framework of the agreed-upon principles of society.[237] [xix]

The relationship may thus constructively be seen as one of two complementary legal spaces, with the *Qānūn* element defined by the political and demographical context, and the *Sharī'a* element wielding influence upon that definition commensurate with the cultural and religious demography of the state. Just as Sharī'a, over history, acted as a broad contextual principle for *fiqh* but did not 'micro-manage' its boundaries in diverse times and places, scholars are making the argument that

[233] The introduction of the Ottoman code was motivated by political considerations. "The Ottoman government wanted to implement the provisions of the Reform Decree (*Iṣlāḥāt Fermanı*) of 1856 and show that the Ottoman legal system complied with Western standards, hoping – in vain, as appeared later – that the Western powers would agree to abolish the capitulations, by virtue of which foreigners in many cases fell outside the jurisdiction of the Ottoman courts of law". (R. Peters, *Crime and Punishment in Islamic Law, Theory and Practice from the Sixteenth to the Twenty-first Century*, Cambridge University Press, 2005, p.130).

[234] Wael Hallaq, *An Introduction to Islamic Law*, Cambridge University Press, Cambridge, New York, 2009, p.168.

[235] Wael Hallaq, *ibid.*.

[236] "Not every sin, in Islam, is a crime; and not every sin, that a Muslim commits, is something that the state has to take legal action against. In fact, to transform a sin or a moral mistake into a crime requires *taqnīn* (a process of legislation). The process of legislation is subject to the politics and the structure of the state." (Jasser Auda, *Sharīʿah, Ethical Goals and The Modern Society*, Muis Academy, The Occasional Paper Series, No.10, 2015, p.5).

[237] See, for instance, 'Abd al-Ḥamīd al-Anṣārī, الإجماع في العصر الحديث (*'Ijmā'* in the modern era'), *Al-Ru'yā* (Oman), 30 Aug 2020.

the very diversity of this *fiqh* heritage militates against its having the authority to micro-manage legislation in a modern nation-state. [238]

C3.1.3 – The mechanisms of Islamic Law and Common and Civil Law

At this point a comparison may usefully be made between the mechanisms of law in the two legal spaces that have formed the amalgam. In unit *C3.1.3* the educator can outline some basic commonalities and differences in approach. All legal systems, of course, function on the basis of precedent in order to prevent juridical anarchy and in the Islamic conception and mechanism of law, the jurist is duly trained to give preference to opinions that come before. The educator will have previously covered the Islamic system on this in unit *C2.2.2 – Precedent and Ijtihād.* However, as the educator can explain, the Islamic system employs precedent in a way that differs from its use in the conventional law systems of Common Law[239] or Civil Law,[240] under which the majority of nations in the world operate.

Under the Common Law, for instance, the return to precedent is at the level of a preceding judge's establishment of a new law based on a balance between analogy with a precedent and an adaptation to a new set of circumstances based on equitable principles. Its uncodified, judge-made case law gives authority to immediately preceding court decisions, which attain the status of an authority on the principle of *stare decisis* ('stand by what has been decided').[241] The structure of the legal system is thus built upon a 'natural law' of customs, traditions, and experiences that have evolved over the course of history, and which continue to evolve.

In Civil Law the use of case precedent is supplementary, and the return to 'precedent' is to a set of defined legal codes elaborated on general rational principles and moving on to specific rules (without reference to other judicial decisions) and applied in a strict, logical way. In both systems laws are not easily altered due to the long process required to enact the law, a process that grants laws in these systems detailed sophistication and longevity.

The educator can usefully focus on the role of 'precedent' and 'change' in legal ruling, since it is here that the differences and the similarities are concentrated. For instance, whereas Civil/Common law systems are flexible, changeable and negotiable, in Islamic countries law is considered in principle absolute and constant. This is a factor of its origin in a Divine Legislator and the perception that alteration in law is an alteration of religious norms, which should itself be an issue for legal sanction.

[238] "Not everything that is Fiqh is supposed to go into the law… The morality of the society in Islam, is supposed to be preserved through the mosque, the family and the educational institutes, not through the law and surely not through a top down approach by the authorities." (Jasser Auda, *ibid*).

[239] Common Law takes its origin from early English law and is based on judicial decision (precedent) in which the principle of judicial decision is usually made in the higher courts and is derived from custom and judicial precedent which the judges apply and interpret. It is, in this sense, a historical natural law where law must be made to conform with the well-established, but uncodified, customs, traditions, and experiences that have evolved over the course of history. Common Law is the system operating in the USA, Great Britain and countries of the former British Empire.

[240] Civil Law, also known as Roman law originated in the *Corpus Iuris Civilis* of the Emperor Justinian (482-565 AD), in which overarching principles have been codified and serve as a main source of guidance. It is based on codes which contain logically connected concepts and rules, starting with general principles and moving on to specific rules. Civil Law is the system used in continental Europe, Central and South America, (non-Commonwealth) Africa, Central and South-East Asia.

[241] The *stare decisis* principle mandates that once an earlier decision is overruled, it is considered a bad authority and cannot subsequently be cited by lawyers to support a point.

➢ *DISCUSSION POINT – The function of precedent in Islamic Law and Common Law*

The educator can initiate here a useful discussion on the relative strength and merits of legal precedent in Islamic law and in Common Law. Contemporary scholars of Sharī'a have noted that in the Islamic system,

> the precedents assigned priority are those that were laid down first and not those that came later….The presumption in Islamic law is that the decisions arrived at earlier are closer to the *uṣūl*, while those that came later are to be handled with caution.[242]

Precisely the reverse order is followed in common law; that is, the latest decision is given precedence over earlier decisions. In the common law system, an earlier decision can be overruled by a subsequent Court or even by a larger Bench of the same Court. Once a case is overruled, it is then considered a bad authority and is not cited by lawyers to support a point. Lawyers are even reprimanded for citing overruled cases. In common law the later the decision, the better it is and the earlier decision has no value for the case at bar.[243] In Islamic law, on the other hand, the earlier the opinion, the better it is. Moreover, if two different decisions based on *ijtihād* are given by the same *qāḍī* in two similar cases, the first decision is *not* invalidated.[244] The implication of this is that in Islamic law a court is not bound by the decision of another court, whether the latter court is of equal rank or higher in the hierarchcal organization.[245]

The discussions in which the educator can thus engage the students include the following:

- In the context of the present-day world, with its fast changing developments in technology, social and demographic structure, and particularly in the increasing religious pluralism of contemporary states, can the Islamic system for the methodology of precedent practically continue to keep pace?
- Does the search for a revival of *ijtihād* carry with it implications for the faculty of reason, which given the fact that training in logic (*manṭiq*) was not strictly required[246], might find itself relegated, in Mohamed Arkoun's words, to "accepting the role of handmaid to the revealed Text, with its sole function to shape, bend and systemize reality in accordance with the ideal meanings it recognizes in God's 'signs.'[247]

In administering the law the Islamic and the Common law systems differ in the role played by the adjudicator. Both Common Law and Sharī'a retains the independence of adjudicator to apply the law based on precedent. But in Islam the recourse to precedent that developed under the *taqlīd* system differs markedly from the process in Common Law, for in the Sharī'a the earlier the precedent, the more authoritative it is considered to be.[248] Effectively, the dynamic of the schools or classical Islamic law may be summed up as providing sophisticated techniques for avoiding innovation.[249] The task of the jurist was therefore one of continually prioritising the return to first

[242] Imran Ahsan Khan Nyazee in his translation of Burhān al-Dīn al-Marghinānī's الهداية في شرح بداية المبتدئ, see *Introduction*, p.xvi.

[243] Muhammad Munir, *op. cit.* pp.468-469.

[244] This is the view of Abū Bakr ibn Masʿūd al-Kāsānī (ob. 587/1191) in his work *The Unprecedented Analytical Arrangement of Islamic Laws*, trans. Imran A. K. Nyazee (Islamabad, Advanced Legal Studies Institute, 2007), p.39.

[245] See Muhammad Munir, *op. cit.* pp. 472-473.

[246] Kamali, *op cit*, *online text* p.324. Wael Hallaq notes that "this split over Greek logical elements in legal theory was to characterize the Islamic legal tradition until the dawn of modernity". See W. Hallaq, *Sharī'a – Theory, Practice, Transformations*, Cambridge University Press 2009, p.81.

[247] M. Arkoun notes the lexical understanding of Reason that 'recognises': "This is the true meaning of the verb *'aqala* in the Qur'ān … It conveys the idea the mind 'reflects' – in the literal sense – truths that are already given or revealed, not those that might be found at the end of a gradual search, let alone a speculative quest. The intelligence is focused on what is already stated and/or experienced, not on the as yet unformulated and/or yet to be experienced." Mohamed Arkoun, *The Unthought in Contemporary Islamic Thought*, Saqi Books, London 2002, p.175.

[248] The earliest major works on Islamic law by Muḥammad ibn al-Ḥasan al-Shaybānī (ob. 189/804), known as the *Ẓāhir al-Riwāya* laid out the preferred rules among the various narrations to be followed by various levels of juridical authority and these were progressively established as preferred precedents.

[249] The perception that *taqlīd* represents the encapsulation of avoiding innovation has, however, been challenged, with the argument that it was more a dynamic institution that appropriated the established authority of the earlier *mujtahid* imams to legitimize the interpretations of later jurists. (Mariam Sheibani, Amir Toft, and Ahmed El Shamsy, *The Classical Period: Scripture, Origins, and*

principles – ensuring conformity with the certainty (*qaṭ'*) of unchallengeable templates in the form of the revelation and the opinions of the early Imams – then following the consensus of Islamic scholars, and then ideally exercising independent reasoning.

Scholars of Sharī'a thus maintain a different interpretation for the meaning of 'precedent'. They cite, for instance, an adjudication by 'Umar ibn al-Khaṭṭāb concerning the division of an estate which was demonstrated to have contradicted an earlier decision by him on the matter, to which the Caliph replied: "That was my decision then, but today I have decided it differently".[250] Ibn al-Qayyim justifies this position thus:

> Truth is [by nature] eternal and is not canceled by anything, and thus a reviewing of truth is better than persisting in falsehood … since an *ijtihād* may alter, the first *ijtihād* need not prevent a second *ijtihād* if it appears that it is the truth. [251] xx

However, the apparent equivalence with *stare decisis* is not precise, since the sources also maintain that the later decision did not constitute the new authoritative position, but *another* authoritative position.[252] The instinct to preserve the credibility of the rulings made under *ijtihād* was too strong to allow for an unambiguous setting of a new precedent, since if one ruling of *ijtihad* could be set aside by another, then the later *ijtihād* must be equally subject to reversal. [253]

In this respect, therefore, there is no *stare decisis*, since the adjudicator at most is merely discovering an interpretation of a *naṣṣ* that he was unaware of. This means that a new adjudication does not become a new authoritative benchmark. There is no new legal *principle* established, rather a new interpretation elucidating and preserving the eternal principles set down by the Qur'ān and the Sunna.[254]

And it is precisely this dynamic that sets Islamic legal thought apart from the *stare decisis* principle of Common Law, where the time relationship is the reverse. Nor does the 'return to first principles' dynamic resemble the dynamic of Civil Law, in that the starting points are not prioritised according to the rational principles on which the latter system is built, but according to perceptions on the individual characteristics, the religious probity, moral trustworthiness and mental competence of the narrators of the source materials, who were living at a certain time in a certain environment.

Early Development in A. Emon and R. Ahmed (edd), *The Oxford Handbook of Islamic Law*, Oxford University Press, 2018, p.15). For some scholars this casuistic attitude has its own merits, in that it is part of the 'genius' of Islamic thought in that it can express new ways of thinking and relating to the world through a discourse that appears ancient and unchanging'. (David Vishanoff, *The Formation of Islamic Hermeneutics*, New Haven, CT: American Oriental Society, p.278). Even so, the newer adjudication does not achieve authority in and of itself and so cannot be equated to legal 'precedent' as understood in Common Law.

[250] This example is given in Ibn al-Qayyim إعلام الموقعين عن رب العالمين Vol. 1: where the passage runs: قال عبد الرزاق حدثنا معمر عن سماك بن الفضل عن وهب بن منبه عن الحكم بن مسعود الثقفي قال قضى عمر بن الخطاب رضي الله عنه في امرأة توفيت وتركت زوجها وأمها وأخويها لأبيها وأمها وأخويها لأمها، فأشرك عمر بين الإخوة للأم والأب والإخوة للأم في الثلث، فقال له رجل إنك لم تشرك بينهم عام كذا وكذا، قال عمر تلك على ما قضينا يومئذ، وهذه على ما قضينا اليوم؛ فأخذ أمير المؤمنين في كلا الاجتهادين بما ظهر له أنه الحق، ولم يمنعه القضاء الأول من الرجوع إلى الثاني، ولم ينقض الأول بالثاني.

[251] Ibn al-Qayyim, *ibid*. Ibn al-Qayyim is citing Abū Mūsā al-Ashʿarī on this point. The *locus classicus* of this issue is the letter of 'Umar ibn al-Khaṭṭāb (ob. 23/644) to Abū Mūsā al-Ashʿarī (ob. 44/665) in which he states: "Identify the precedents and resembling cases and undertake analogy when such cases are found. Then rely on what appears to be more appropriate and pleasing to Allah, the Exalted, and what is most suitable as the truth … Let not a judgment you rendered yesterday, and that you have [later] reflected upon, receiving guidance towards the correct view, prevent you from restoring a right. Rights are ancient and cannot be annulled. Restoring a right is by far better than persisting in a manifest error". ولا … اعْرِف الأشباه والأمثال، فقِسِ الأمورَ عند ذلك واعْمِدْ إلى أقربها إلى الله، وأشبهها بالحقِّ يمنعُك قضاءٌ قضيتَه بالأمسِ راجعتَ فيه نفسَك وهُديتَ فيه لرشدِك من أن تراجعَ الحقَّ ، فإنَّ مراجعةَ الحقِّ خيرٌ من التَّمادي في الباطلِ

[252] فجرى أئمة الإسلام بعده على هذين الأصلين ('so the Imams of Islam proceeded thereafter on the basis of both these principles'). Ibn al-Qayyim, *ibid*. The precedent of the Companions on this issue led to the formulation of a legal maxim which provides that *'*an *ijtihād* may not be overruled by its equivalent' (الاجتهاد لا يُنقض بمثله). Jurisprudents justify this with reference to 'Umar 's refusal to overrule a judgement by 'Alī and Zayd which he considered erroneous on the grounds that "had it been a matter of applying the Qur'ān or the *Sunna*, he would have intervened, but since the decision was based in *ra'y*, they were all equal in this respect." (Ibn al-Qayyim, op. cit, vol I, 177). لو كنت أدرك إلى كتاب الله ، أو إلى سنة نبيه - صلى الله عليه وسلم - لفعلت ، ولكني أدرك إلى رأي ، والرأي مشترك ، فلم ينقض ما قال علي وزيد

[253] See M., Kamali, *Principles of Islamic Jurisprudence*, p.319-320 for a discussion on this.

[254] The reasoning for this instinct is set by *Qur'ān* V (*al-Mā'ida*), 49: "So judge between them by that which Allah hath revealed, and follow not their desires, but beware of them lest they seduce thee from some part of that which Allah hath revealed unto thee". وَأَنِ احْكُمْ بَيْنَهُمْ بِمَا أَنْزَلَ اللَّهُ وَلَا تَتَّبِعْ أَهْوَاءَهُمْ وَاحْذَرْهُمْ أَنْ يَفْتِنُوكَ عَنْ بَعْضِ مَا أَنْزَلَ اللَّهُ إِلَيْكَ

The accumulated nuances of practical experience, or the adaptation to changed circumstances, do not occur. There are thus implications for the flexibility of the Islamic system to accommodate the accumulated nuances of practical experience, or the adaptation to changed circumstances, the *mutaghayyirāt* of the contemporary world.

A process of convergence is taking place

What is interesting in terms of the contemporary amalgam is that, under the influence of reality on the ground, all three legal systems – Islamic, Civil and Common Laws – are undergoing a process of convergence. The Civil Law legal system is undergoing convergence with the Common Law, at least in terms of its increasing dependence on case law and the role of judges in the creation of law, while still citing certain cases as an illustration of the general principle, not as an authoritative statement of principle. Similarly, current practice in Muslim countries actually to some extent assumes, in spirit at least, the *stare decisis* principle in that the courts take for granted the validity of the idea that one *qiyās* may become the *aṣl* of another *qiyās.* [255]

What nevertheless stands out in the Sharī'a system, when compared to sytems of Common Law and Civil Law, is the existence of higher degress both of ambiguity and rigidity. On the one hand the source material which is held to be authoritative and uincontrovertible suffers from lack of clarity, capable of multiple interpretations with little that can be held as 'of decisive indication' (*qāṭi' al-dalāla*); on the other hand the single *qāḍī* is the adjudicator of both facts and law, and there is no formal provision for representation. The consequent rigidity in the system of procedure and evidence makes fact-finding an almost automatic process and advocacy wholly superfluous. There is thus small provision for testing and appeal.[256]

- *DISCUSSION POINT – Legal pluralism and rigidity in the contemporary codification of Sharī'a*

The issue of rigidity and 'legal plurality' is an interesting theme for the educator to address, since in the adaptation of Sharī'a to the amalgam under the pressure of codification, certain aspects deemed fundamental to the heritage were sidelined and others intensified. In examining the practicalities of the amalgam the educator can pose the following questions:

- Is legal plurality the operative feature of Islamic law, or the authority of a single *qāḍī*? What provision is there for testing an adjudication and legal appeal, given the conflict between *ijtihād* and *taqlīd*?
- How is legal stability maintained if a) according to the principle of *taṣwīb* every jurist is 'correct' in his *ijtihād?* or b) if the principle of *takhṭi'a* (fallibilism) determines that only one jurist can be correct while the other is 'in error'? [257]
- Does the argument of the *mukhaṭṭi'a* fallibilists and the privileging of a single interpretation imply juristic hubris, since it assumes that the divine legislative intent has been captured?
- In a system where there is no authority to disqualify an earlier adjudication (as opposed to the *stare decisis* principle) on the grounds that both adjudications are deemed methodologically sound, does this implied 'legal pluralism' lead to legal indeterminacy?
- Given the unresolved debate on هل كل مجتهد مصيب ('is every jurist correct')[258] – is the codification of the Sharī'a a practical possibility?

[255] See Kamali, M - *Principles of Islamic Jurisprudence*, p.184.

[256] N. Coulson: *Conflicts and tensions in Islamic jurisprudence*. University of Chicago Press, 1969, p.61.

[257] The principle of *takhṭi'a* was designed to avoid the problems of implicating the 'erroneous' jurist in sin for his having 'deviated' from the truth in a legal system with a divine author. 'Error' (*al-jahl*) in the law is not harmful unless it amounts to giving lie to the Prophet by denying what rests on *tawātur*. This would implicate the jurist in the sin of unbelief (*kufr*). On this, see A. Zysow, *The Economy of Certainty, An Introduction to the Typology of Islamic Legal Theory*, Lockwood Press, 2013, p.144.

[258] The debate focused around the ḥadīth of (among others) *Sunan an-Nasā'ī* 5381: إذا اجتهد الحاكم فأصاب فله أجران، وإذا اجتهد فأخطأ فله أجر *"If a judge passes judgment and strives to reach the right conclusion and gets it right, he will have two rewards; if he strives to reach*

The narrowing of the scope of Sharī'a law

While the rupture with the past of course necessitated a reinvention of Sharī'a in the 20th century world of nation-states, the negotiation of these changes came to be dominated by thinkers who saw this task as falling entirely within a reduced *textual dimension* of fixed punishments and ritual requirements. As the authority of Sharī'a law became transformed / dismantled during the colonial period, rigidity became more pronounced as the entexting process took hold. [259]

In addition, whenever a Muslim country sought to 'uphold the Sharī'a' by codifying certain Islamic laws, the process in each case served to enshrine the interpretation of a single jurist, and elevate it to Sharī'a status. This was pursuing a principle alien to the heritage at the same time as presenting it as the heritage. Since, in fact, the *sine qua non* of Islamic societies was a form of legal pluralism on the grounds that no one jurist could be certain of his ruling (hence the appearance of the canonical schools) the process is legally, and indeed, theologically problematic.[260]

It has also engendered conflict on the ground, as putting pared-down precolonial Islamic laws into contemporary legal codes raised tensions with the contemporary Muslim publics:

> The inefficiencies and injustices that were heretofore theoretical in precolonial legal texts have now become actualized in the context of nation-states. Many of the historical Islamic laws that nation-states chose to adopt run counter to popular movements that promote human rights, gender egalitarianism, religious liberty, modern finance, and pluralistic governance, among other concerns. [261]

The Maldivian experiment

The educator may usefully examine an interesting example of this process and the problems it caused in the recent case of the Maldives. In the summer of 2004, a death in correctional custody and general dissatisfaction with many aspects of the criminal justice system sparked large public demonstrations in the island state. The public unrest prompted the Maldivian government and the United Nations Development Programme (UNDP) to initiate a research project by the Criminal Law Research Group (CLRG) at the University of Pennsylvania Law School to study and critique all aspects of the Maldivian criminal justice system and suggest how it might be improved.[262] The project required 'a synthesis of Islamic law, Maldivian values and internationally accepted norms and standards' in order to rectify the evidence on the ground of the failures of the Sharī'a legal system to ensure justice.[263] The CLRG compiled and categorised all those pertaining to crime and punishment into a scheme typical of modem penal codes.

Since much, if not most, of current Maldivian penal law derived from the Sharī'a, the CLRG also researched the writings of respected Muslim jurists, both classical and contemporary, from Maldivian jurisprudential history as well as from the experience of Malaysia and Pakistan in search of parallels.

The Maldivian request potentially offered a *tabula rasa* for a new codification difficult to achieve elsewhere where there were entrenched codification histories. But the amalgam between the

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the right conclusion but gets it wrong, he will still have one reward." Opponents interpreted this either as a statement that every *ijtihād* lead to the Truth, or that this was impossible, given the Qur'ānic verse IV (al-Nisā'), 82: وَلَوْ كَانَ مِنْ عِنْدِ غَيْرِ اللَّهِ لَوَجَدُوا فِيهِ اخْتِلَافًا كَثِيرًا *"And if it were from any other than Allah, they would have found in it many a discrepancy."*

[259] Wael Hallaq, *An Introduction to Islamic Law*, Cambridge University Press, Cambridge, New York, 2009, p.168.

[260] See Sohaira Siddiqui, 'The Paradoxes of Codifying Islamic Criminal Law in the Maldives'**,** *Middle East Law and Governance* 9, 2017, Brill 2017, p.186.

[261] Rumee Ahmed, *Which Comes First, the Maqāṣid or the Sharīʿah?* in Idris Nassery, Rumee Ahmed, and Muna Tatari (eds.), *The Objectives of Islamic Law: The Promises and the Challenges of the Maqāṣid al-Sharīʿa,* Lexington, 2018, p.240.

[262] The exercise is detailed in Paul Robinson (et al.), 'Codifying Shari'a: International Norms, Legality and the Freedom to Invent New Forms', *Journal of Comparative Law*, 2:1, 2007, Univerrsity of Pennsylvania Law School, *Public Law Working Paper* No. 06-26.

[263] These failures were identified in "the problems of assuring fair notice and fair adjudication in the uncodified shari'a-based system in present use". See Paul Robinson (et al.), *op. cit.,* p.1.

religious imperatives of the Sharīʿa heritage and the cultural, social and political preferences demanded by contemporary Maldivians proved problematic.

For instance, if the point of departure was Islamic law, the centre of gravity in the exercise was the international norms, to which the consultant Sharīʿa scholars on the team strove to adapt the Islamic legal heritage,

> sometimes through interesting approaches by which the spirit of the shari'a rule could be maintained without violating international norms.[264]

The interesting approaches applied to the problem of the *ḥudūd* penalties included the following:

1. Finding a point of compromise between the Sharīʿa and international norms and banishing capital punishment to highly rarified instances of egregious intentional and cruel homicide (thus giving judges more latitude to avoid the penalty and removing it as the *ḥadd* for banditry, unlawful sexual intercourse, and apostasy);

2. Making punishments only 'symbolic' (so that 'conceptual Sharīʿa legitimacy' is of the *ḥudūd* is retained[265] without contravening international norms of cruel and inhumane punishment);

3. Limiting the scope of, and reducing, the *ḥudūd* penalties (e.g. alcohol consumption, omission of obligatory fasting, or apostasy are re-defined as 'quasi-criminal' offenses, not prosecutable since they are private acts or beliefs);[266]

4. Instituting the starting-point of non-prosecution (e.g. unlawful consensual sexual intercourse is labelled as a misdemeanor and can only be punished by short-term imprisonment and/or a monetary fine).[267]

That is, the focus was on retaining 'conceptual legitimacy' of the *ḥudūd* while limiting their actual application. This meant the ignoring of classical conceptualizations of Islamic criminal law and the establishment of judicial procedures that served as preventative measures against the its implementation of Islamic *ḥudūd*. In her study of the Maldivian experiment Sohaira Siddiqui re-stated the innate problem of codification thrown up by this exercise, in that

> reliance [was] placed on a narrow body of texts, and extracted rules … reformed for easy implementation and compliance with modern human rights standards,[268]

leading to the paradox that:

> the resulting criminal code is less punitive, but more enforceable than its classical counterpart. A second paradox is that on one hand religious legitimacy and moral credibility is desired through the implementation of an Islamic penal code, but on the other, controversial criminalized actions are assumed to be non-prosecutable.[269]

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[264] Paul Robinson (et al.), *op. cit.*, p.51.

[265] Drafters of the code proposed this methodology for the *ḥadd* punishment of lashing: "The symbolic punishment of striking an offender's back with a short length of rope in a manner not designed to cause bodily injury. A single person must inflict all of the lashes prescribed as punishment, and he may only drive the rope using his wrists; he may not use any other part of his arm or movement in his shoulders, hips, back, legs or torso for that purpose". See Paul Robinson, *Final Report of The Maldivian Penal Law and Sentencing Codification Project: Text of Draft Code (Volume 1) and Official Commentary (Volume 2)*, January 2006 U of Penn Law School, Public Law Research Paper No. 09-38, p.95.

[266] Removing it from an arena of thought crime, the criminal sanction against apostasy is re-defined as limited to intentional attacks on the core tenets of Islam when coupled with public pronouncements intending to harm the faith. See Paul Robinson, *op. cit.*, p.189: 'Offenses Against Public Order, Safety, and Decency - Section 617 – Criticizing Islam').

[267] The grading provision for a 'Class 1 Misdemeanor' under which this falls, is one yeaar's imprisonment. Paul Robinson, *op. cit.*, pp.9 and 71.

[268] Sohaira Siddiqui, *op. cit.*, p.174.

[269] In her conclusion Siddiqui poses the question: "[I]f the *ḥudūd* are so central to a new criminal code, what can explain the sustained effort to circumvent the punishments that all but guarantees their non-prosecution? Is the simple desire to accord with human rights law sufficient to answer these questions? Though the Maldivian concern with not violating human rights is at the forefront of their

The dominant challenge of the Maldivian exercise in drafting a new penal code was therefore twofold: a) to avoid contravening international human rights norms by promulgating criminal punishments that were now conceded as barbaric; b) to balance this with the desire for domestic 'moral credibility' by upholding the Sharīʿa.

Meanwhile western observers deplored the superficiality of the exercise and its role in legitimising and perpetuating legal practices that the international norms held to be unacceptable.[270]

Module C3.2 – THE SHOCK OF THE NEW: REACTIONARY SCHOLARSHIP

C3.2.1 - The search for a 'pre-colonial' template

Due to a conviction among more orthodox-minded scholars of the 'non-authenticity' of the amalgam, and that acquiescence to, and appreciation of, systems of governance not found in the Islamic historical tradition constituted an attack on Islam itself,[271] a reactive, antiquarian instinct took hold. The urge to sacralise the legal heritage dominated discussion. Many colonial-era Muslim jurists argued that the authenticity of law lay in its ancient past. These warned that modern laws, being 'inherently corrupt', were only legitimate if and when they agreed with precolonial laws.[272] This rhetoric was adopted on the state level, and in a bid to shore up political authority, several Muslim-majority states duly sought to demonstrate the Islamic authenticity of their laws by highlighting the textual dimensions of Sharīʿa in their legal codes.

This quest for 'authenticity' only caused difficulties due to the Islamically *anomalous* position of legal prescriptions – from a different age and environment – being forcibly applied to irrelevant contexts. The problem lay in the legal ambiguities of the Sharīʿa system itself. These ambiguities were partly due to the 'scholarly discourse' nature of the *fiqh* debates, as outlined in unit *C2.3.3*. Precolonial jurists were not composing the type of official legal documents that underpin contemporary state-based criminal and civil codes but rather, as Rumee Ahmed indicates, they were reflecting on an ideal law with little or no link to actual court-based litigation and adjudication:

> Jurists wrote *fiqh* books not as codes, but as arguments about the way that humans ought to relate to God. As arguments, they were speculative and theoretical, exhibiting a high level of abstraction, and contemplating cases that might never occur in everyday life. These books regularly promoted injunctions related to criminal and civil law that would, if actually implemented in a legal code, result in inefficiencies and outright injustices.[273]

But these ambiguities were also due to the internal mechanisms of *fiqh* methodology itself, whereby the process of tying things back to an ever receding first principle demanded an ever-extending exercise in sophistry.

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discourse on any new legislation, their emphasis on creating an Islamic criminal code seems more connected to a concern for the religious legitimacy of the state, than with any allegiance to Islamic law." (Sohaira Siddiqui, *op. cit.*, p.198).

[270] Daniel Pipes argued that the code's criminal provisions should not be 'cleansed and modernised' but critiqued "from a Western point of view" to demonstrate "how this religiously-based legal system contradicts virtually every assumption an American makes, such as the separation of church and state, the abolition of forced servitude, the right not to suffer inhumane punishments, freedom of religion and expression, equality of the sexes, and on and on. The Sharīʿa needs to be rejected as a state law code, not made prettier." Paul Robinson (et al.), 'Codifying Shari'a: International Norms, Legality and the Freedom to Invent New Forms', *Journal of Comparative Law*, 2:1, 2007, Univerrsity of Pennsylvania Law School, *Public Law Working Paper* No. 06-26, p.52.

[271] On this see above *Introduction*, Section I, on *The Characteristic Features of Islamist education - A search for 'authenticity'*.

[272] Rumee Ahmed, *Which Comes First, the Maqāṣid or the Sharīʿah?* in Idris Nassery, Rumee Ahmed, and Muna Tatari (eds.), *The Objectives of Islamic Law: The Promises and the Challenges of the Maqāṣid al-Sharīʿa,* Lexington, 2018, p.240.

[273] Rumee Ahmed, *op. cit*, p.239.

C3.2.2 – The challenge to the madhhab system

The educator can highlight a conspicuous feature of Sharī'a's transformation during this period of legal amalgam: the profound implications that it had for the *madhhab* system.

Legal practice in most of the Muslim world is now defined by government policy and state law so that, beyond domestic disputation and personal ritual practice, the influence of the traditional schools is dependent upon the status and operative space accorded to them within the national legal systems. Within the reduced arena of 'textual' Sharī'a the selection of rulings is made without restriction to the parameters of a particular *madhhab*, while parts of different rulings are combined with reference to a point of law.

This is contradictory to the legal heritage of the Sharī'a. Even though scholars had long criticised uncritical and partisan attachment to a *madhhab,*[274] most of them advocated training under the *madhhab* system for the protection it afforded against the perils of auto-scholarship and the danger of undermining legal authority by an individual jurist's selectivity.[275]

➢ *DISCUSSION POINT – The challenge of non-madhhabism*

This sidelining of the *madhhab* principle has come to trouble the waters of the contemporary Sharī'a arena in another way. The educator can here explore the heated debates on the authenticity and permissibility of the non-*madhhab*ism espoused by an entire trend of contemporary thinkers. He may illustrate this from its mediaeval condemnation in works such as الرد على من اتبع غير المذاهب الأربعة ('*A Refutation of those who follow other than the Four Schools*') by Ibn Rajab (d. 795/1393) and modern commentaries such as Saʿīd Ramaḍān al-Bouṭī's اللامذهبية أخطر بدعة تهدد الشريعة الإسلامية ('*Anti-Madhabism is the most dangerous innovation threatening the Islamic Sharī'a'*) and contrast this with the writings of modern Atharīs and 'neo-Atharī' advocates among the Islamists promoting it, such as Muḥammad Sulṭān al-Maʿṣūmī al-Khujandī's: هل المسلم ملزم بإتباع مذهب معين من المذاهب الأربعة (*Is a Muslim Obliged to Follow a Specific One of the Four Madhhabs?*).[276] The central questions for evaluation with the students include the following:

- Does the legacy of Ibn Taymiyya and Ibn al-Qayyim – noted for their dissident position with the mainstream on this – justify the effective auto-scholarship that the neo-Atharīs propose?
- How far did these dissidents promote auto-scholarship in their writings? Did these authors in fact allow for untrained Muslims to attempt *ijtihād* without expert help?[277] Does the defence of *taqlīd* outlined in unit *C2.2.2 - Precedent and ijtihād* still hold weight?

[274] This includes al-Ghazālī, himself the author of four textbooks of Shāfiʿī *fiqh.*

[275] Cf. Aḥmad al-Wansharīsī: "It is not permitted for the follower of a scholar to choose the most pleasing to him of the schools and one that agrees the most with him. It is his duty to do *taqlīd* of the Imam whose school he believes to be right in comparison to the other schools and follow it in every detail." لا يجوز لمقلد العالم اختيار أطيب المذاهب عنده وأوفقها لطبعه, عليه تقليد إمامه الذي اعتقد صحة مذهبه وصوابه على غيره, ويتبعه في كل ورد وصدر (Aḥmad al-Wāsharīshī, المعيار المعرب والجامع المغرب عن فتاوى أهل أفريقية والاندلس والمغرب, vol.11 p.163-164

[276] Al-Khujandī's argument is that: "As for the *Madhhabs*, these are the views and *ijtihāds* of the ulema on certain issues; and neither Allah nor His messenger have compelled anyone to follow them … As for following a doctrine of these four or other doctrines, it is neither a duty nor recommended, and no Muslim is obliged to adhere to one of them strictly. On the contrary, whoever adheres exclusively to one of them in matters that concern him is a fanatic, mistaken, a blind imitator, and one of those who have sown divisions in their religion…Where there is an indicative text from the Book and the Sunna, or the sayings of the Companions – may God Almighty be pleased with them – then one must adopt this and not be diverted therefrom to the views of the scholars". أما آراء أهل العلم وأفهامهم في بعض المسائل وأجتهاداتهم ، وهذه الآراء والاجتهادات والفهوم لم يوجب الله تعالى ولا رسوله على أحد اتباعها ... وأما ابتاع مذهب من هذه المذاهب الأربعة أو غيرها ، فليس بواجب ولا مندوب ، وليس على المسلم أن يلتزم واحدا منها بعينه ، بل من التزم واحدا منها بعينه في كل مسائله فهو متعصب مخطئ مقلد تقليدا أعمى، وهو ممن فرقوا دينهم فحيث وجد نص الكتاب والسنة وأقوال الصحابة رضي الله تعالى عنهم فالاخذ به واجب لا يعدل عنه إلى أقوال العلماء … Muḥammad Sulṭān al-Maʿṣūmī al-Khujandī: هل المسلم ملزم بإتباع مذهب معين من المذاهب الأربعة (*Is a Muslim Obliged to Follow a Specific One of the Four Madhhabs?*, (first published in 1949), 2nd ed. 1420/1999. Al-Bouṭī's essay was penned in the 1960s as a refutation of this work.

[277] The question revolves around Ibn Qayyim in his work إعلام الموقعين عن رب العالمين – particularly *Section (fā'ida) Fifty,* in which the question هل للمفتي المنتسب إلى مذهب إمام بعينه أن يفتي بمذهب غيره إذا ترجح عنده ("Does a mufti who is affiliated with a particular imam's *madhhab* have the right to give *fatwās* according to another *madhhab* if it is more likely in his view?") is given an answer that appears contradictory: "If he is following the method of that Imam in *ijtihād* and ascertaining the *dalīl*, then this following of the Imām is the right thing to do, and he should issue his *fatwā* based on what he considers to be the correct opinion" (Ibn Qayyim al-Jawziyya, إعلام الموقعين عن رب العالمين Ed. M. 'Abd al-Ḥamīd, Cairo 1373/1955, Vol. 4, p.237). - فإن كان سالكا سبيل ذلك الإمام في الاجتهاد ومتابعة الدليل أين كان

- How did the protagonists make their case from scriptural indications?[278]
- Did the age in which these dissidents emerge constitute an exceptional doctrinal environment that does not apply today?
- Does the historically marginal status of Ibn Taymiyyah and Ibn al-Qayyim in the heritage of Islamic law preclude them from defining the parameters of legal thought today?

The authenticity pre-occupation and the implications of auto-scholarship

The disarray is a factor of the amalgam and the pre-occupation with 'authenticity'. The educator can evaluate with the students the implications of this preoccupation, and whether the repudiation of classical scholarship in some doctrinal trends is a feature of the 'shock of the new'. Historians have pointed to the deconstruction/reconstruction approach of Islam of the 19th and early 20th century reformers, such as Jamāl al-Dīn al-Afghānī, Rashīd Riḍā' and Muḥammad 'Abduh. Traumatized by the success of the western powers and the spectacle of Ottoman collapse, these figures sought cultural renewal through the rejection of the mechanisms of classical law, and the rejection of *taqlīd*, which they held responsible for its rigidity and inability to keep pace with the changing world. Their ostensible task was to jettison historic Muslim culture while maintaining authenticity by retaining a 'pristine essence', which they saw as exposing the roots of modernity within Muslim civilization.

The process of paring down the Islamic heritage, however, had an unexpected effect. Part of this anti-rigidity process, paradoxically, has engendered a new rigidity vis-à-vis the diversity of the classical canon, leaving today's reformers with a difficult task in adapting Sharī'a to modern environment, in the face of a growing public tendency to look upon their work with suspicion. The suspicion is fed in particular by contemporary Salafist thinkers who have replaced the historical latitude of the jurisprudential tradition with an intolerant attitude to diversity.

However, unlike the 19th-20th century reformers, their location of the causes of decline in the classical *madhhab* heritage has not fed an impulse towards symbiosis with contemporary modernity, but prioritised a reverse dynamic: purification through pre-modern 'authenticity' and auto-scholarship. By jettisoning a legal heritage hallowed by antiquity and honed by human experience and rational evaluation, they proffer an artificial 'new antiquity' (on this see the observation on the search for authenticity and the pre-occupation with decontamination in *Part I: The Case for Educational Reform - The Islamist domination of the education sector*).

وهذا هو المتبع للإمام حقيقة - فله أن يفتي بما ترجح عنده من قول غيره . On this, see Saʿīd Ramaḍān al-Bouṭī, اللامذهبية أخطر بدعة تهدد الشريعة الإسلامية, Dār al-Fārābī, Damascus, 1426/2005, p.81.

[278] For instance, pro-*madhhab* scholars cite Qur'ān IX (*al-Tawba*) 122: *"And the believers should not all go out to fight. Of every troop of them, a party only should go forth, that they (who are left behind) may gain sound knowledge in religion, and that they may warn their folk when they return to them, so that they may beware"* وَمَا كَانَ الْمُؤْمِنُونَ لِيَنْفِرُوا كَافَّةً فَلَوْلَا نَفَرَ مِنْ كُلِّ فِرْقَةٍ مِنْهُمْ طَائِفَةٌ لِيَتَفَقَّهُوا فِي الدِّينِ وَلِيُنْذِرُوا قَوْمَهُمْ إِذَا رَجَعُوا إِلَيْهِمْ لَعَلَّهُمْ يَحْذَرُونَ while anti-*madhhab*ists cite maxims such as Aḥmad ibn Ḥanbal's "Do not follow my opinion; neither follow the opinion of al-Mālik, nor al-Shāfiʿī, nor al-Awzāʿī, nor al-Thawrī, but take from where they took" on the grounds of Qur'ān XVI (*al-Naḥl*) 64: *"And We sent down the Book to thee for the express purpose, that thou shouldst make clear to them those things in which they differ"* وَمَا أَنْزَلْنَا عَلَيْكَ الْكِتَابَ إِلَّا لِتُبَيِّنَ لَهُمُ الَّذِي اخْتَلَفُوا فِيهِ or Qur'ān XXXIII (*al-Aḥzāb*) 36: *"It is not fitting for a Believer, man or woman, when a matter has been decided by Allah and His Messenger to have any option about their decision"* وَمَا كَانَ لِمُؤْمِنٍ وَلَا مُؤْمِنَةٍ إِذَا قَضَى اللَّهُ وَرَسُولُهُ أَمْرًا أَنْ يَكُونَ لَهُمُ الْخِيَرَةُ مِنْ أَمْرِهِمْ .

C3.2.3 - Authenticity and the Salafists

Focussing on the doctrinal underpinning of the Islamists, the educator can here examine with the students the self-identification of the Salafists – in all the breadth of the spectrum – and their specific claims made concerning 'authenticity'.[279] The discussion is of particular importance given the success of Salafist thinkers in posing a challenge to the traditional *'ulamā',* not least for their effectiveness in meshing together the societal appetite for reform to meet the challenges of modernity, with a formula to reassure the public of an Islamic pedigree that pre-dates the 'colonial' amalgam.

Under the Salafists' decontaminated 'new antiquity' the diversity of legal thought that allowed for inevitable differences in opinion on matters and texts with disputable status in authority and meanings (*naṣṣ ẓannī al-thubūt wal-dalāla*) is submerged by the self-styled adherents of *al-Firqa al-Nājiya* ('the saved sect'), *al-Nājūn min al-Nār,* (those 'saved from Hellfire'), *al-Ṭā'ifa al-Manṣūra* ('the group granted victory'), and *al-Ghurabā'* (the 'strangers' to the present *jāhiliyya*[280]). Under their vocabulary of *bid'a* ('reprehensible innovation'), *shirk* ('the association of partners to the Godhead') or *kufr* ('disbelief') the etiquette of discussion – outlined in the accumulated library of works on *adab al-ikhtilāf* – is gone.

The success of 'new antiquity' is no less due to the fact that it goes in deeper, to the mediaeval corpus of jurisprudential thought which is held to deviate from the pristine faith. By taking back the diagnosis to the entire classical edifice of Islamic law and practice as the cause of the decline, a conundrum appears to be resolved: that is, a faith community that is enjoined to self-identify as *'the best of the nations raised up for the benefit of men'*[281] and one that is vouchsafed victory by God ('*To help believers is ever incumbent upon Us*'[282]), being nevertheless relegated to the margins of world development for half a millenium.

The name and the self-identification

While the discussion on categorising the various shades of Salafist thought is ongoing,[283] in presenting these currents the educator can usefully focus first of all on the claim to the name 'Salafist'. Broadly speaking, the self-identification as 'Salafist' is a subject of discussion and dispute. The historical origin of the use of the term *Salafiyya* is actually difficult to place since the 'traditionalism' that it represents was only retrospectively referred to as *al-nahj al-salafī* or *al-salafiyya*.[284]

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[279] The word 'Salafist' derives from the term used to denote the early Muslim community of *al-salaf al-ṣālih or al-salaf al-ṣāliḥūn,* the 'pious predecessors.' This paradigmatic community of pristine Muslims is held to comprise the first three generations of Muslims, the companions of the Prophet Muhammad and the two succeeding generations after them (the *tābi'ūn* and the *taba'at al-tābi'īn*). As such they are the model to which almost all Muslims would theoretically aspire, for given the fact that they learned Islam directly from the Prophet, it is held that they understood the true meaning of the religion and the forms that it should take.

[280] The term comes from the Prophet's hadīth (e.g. *Ṣaḥīḥ Muslim*, 145): بدأ الدين غريبا وسيعود غريبا كما بدأ فطوبى للغرباء ("*Islam started as something strange and will return back as something strange, the way it began, so blessed are the strange ones"*) and is a favourite term used by the more extreme, activisit and militant wing of the Salafists.

[281] كُنْتُمْ خَيْرَ أُمَّةٍ أُخْرِجَتْ لِلنَّاسِ Qur'ān III (*Āl 'Imrān*) 110.

[282] وَكَانَ حَقًّا عَلَيْنَا نَصْرُ الْمُؤْمِنِينَ Qur'ān XXX (*al-Rūm*) 47. The bewilderment was intensified following the Napoleonic conquest of Egypt. The historian al-Jabartī (1753-1825) noted that "contrary to ancient custom, non-Muslims wear fine clothes and bear arms, they wield authority over Muslims, they behave in a way which inverts the order of things established by divine law". 'Abd al-Raḥmān al-Jabartī: تاريخ عجائب الآثار في التراجم والأخبار .

[283] The divisions are variously given as: 'Scholarly' Salafism (*al-salafyya al-'ilmiyya*), 'Activist' Salafism (*al-salafiyya al-da'wiyya)* and 'Jihadist' Salafism *(al-salafyya al-jihādiyya)* or alternatively as Modernist or 'Enlightened' Salafists (*Al-Salafiyya Al-Tanwīriyya)* of the al-Afghānī/'Abduh model, and Purist or Pietistic Salafists. In some cases the current is divided into five: *Liberal Salafists* (orthodox in belief, but not rigorous in practice) – *In-Between Salafists* (holds both conservative and liberal views) – *Conservative Salafists* (ultra-orthodox in belief and practice) – *Tabloid Salafists* (activist and severely accusatory of those 'not on the *manhaj'*) – *Jihādī-Takfīrī Salafists* (violent militants).

[284] The term can in fact be traced back to the medieval period, since it was used, for instance, by Ibn Ḥanbal (780–855/164–241 AH) who defined his approach as 'according to the Salaf' – thus claiming with the term a greater legitimacy to his *'Atharī'* method. Another early use of the term was Ibn al-Samʿānī (d. 561/1166) in his *Kitāb al-Ansāb* ('Genealogical Dictionary'), as something which "refers to the pious ancestors and [one's] adoption of their madhhab هذه النسبة إلى السلف وانتحال مذهبهم . It was subsequently taken

Anti-Salafist Muslim thinkers refuse the Salafists' exclusive claim on the term *al-salaf al-ṣāliḥūn,* arguing that most Muslims may claim this denomination, as followers of the doctrine established by these and perpetuated by *al-khalaf al-ṣādiqūn,* the 'truthful successors'. Their position is that 'Salafism' in the contemporary sense of the term is a latter-day aberration. Adding to the confusion is that in the contemporary period the term is used both for the above-mentioned 'modernist' reformers of the 19th and early 20th centuries – who are credited with reviving and popularising the term *Salafī* as a defining authentication of their movement – and for the contemporary Salafiyya trend. The origins of this contemporary usage of 'Salafī' may be ascribed to the influence of the early modernist reformers, but the ambiguity of their programme for restoring pristine purity allowed for widely different interpretations, and thus proved too imprecise and fluid. This meant that many of the ideas that came to claim allegiance to the reformist *salafī-iṣlāḥī* movement were not exclusively modernising, but could also incorporate the literalist teachings of Muḥammad ibn 'Abd al-Wahhāb via the legacy of Muḥammad Rashīd Riḍā' and the literalist approach to the scriptures that he championed. [285]

The identification of the problem, and the resolution sought through literalism, depended upon the perception that the political and cultural decline of the Islamic world was not a matter of history or politics: it was a *religious* issue – the abandonment of core aspects of the faith through neglect and intellectual corruption. The solution is therefore to re-establish religious authenticity.

For the more contemporary Salafists, the model for this re-authenticated Islam has to be from a time that pre-dated any influence foreign to 'true Islam'. Their primary purpose is therefore one of re-empowerment through this re-authentication, to be effected on the basis of a formula that *to progress, one must first regress* – to that pristine, uncontaminated age. Mixed in with this authentication, as some Muslim thinkers have observed, there also appears to be an ethnocentric impulse.[286] (On this, see Introduction Section II - *The damage wrought by Islamist education - The afterlife of an ethnocentric tribal culture*).

To protect the boundaries of 'true Islam' Salafists aim to eradicate what they hold to be the impurities introduced during centuries of religious practice. To do this the Salafist movements revsit the legal arena, and claim that they are freeing up this arena by urging a direct relation of the individual to the texts – as opposed to following the dispensations of medieval jurists. They claim that the study of these medieval schools is unnecessary, and instead focus their energies on the more mechanical exercises of scholarship on the source texts. This accounts for the considerable attention they pay to *hadith* scholarship and evaluation. So much so that they often choose to refer to themselves as the "People of the Hadith" (*Ahl al-Ḥadīth*).

The educator can illustrate the major features underpinning the Salafist approach to legal reasoning which include the following:

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up by Ibn Taymiyya (1263-1328), whose conception of Salafism was actually idiosyncratic and a departure from Ibn Ḥanbal's Atharī method.

[285] As Hassan Mneimneh observes, "by the 1920s and 1930s, both Hasan al-Banna (the founder of the Muslim Brotherhood and an early advocate of regimenting Muslims in a theocratic state) and Ali Abd al-Raziq (an Azhari scholar who sought to build a secular civil state rooted in Islamic doctrine) could legitimately claim to be the intellectual heirs to Muhammad Abduh's *salafi-islahi* project." H. Mneimneh, 'The Spring of a New Political Salafism?' *Current Trends in Islamist Ideology*, Volume 12, October 2011.

[286] Cf. the comments by the former muftī of Marseilles, Soheib Bencheikh: "This religion is more than fourteen centuries old, but it still debates about what one should wear or not. I hardly imagine the Archangel Gabriel will come down to earth back and forth just to teach the Arabs and Muslims on how Muslims should dress." (S. Bencheikh, *We Need Dearabization of Islam,* Islamlib, 2006). At a subconscious level, Arab and non-Arab Muslims appear to struggle with this dual identity of Islam. The result of this ambiguous relationship is the tendency to culturally defer — as a matter of precaution — to the norms of the people to whom the Revelation was granted. It accounts for the creeping 'Arabisation' of Muslim communities in matters not immediately connected to belief, and at the expense of local traditions. The cultural erasing extends to the nation's pre-Islamic history too, in conformity to the tendency to see all territory foreign to the seventh century Arabian model — whether this be conceived geographically, culturally or even chronologically — as part of the continuum of *jāhiliyya*, the 'Age of Ignorance' that Islam came to abolish. V.S. Naipaul observed this phenomenon: **"**The cruelty of Islamic fundamentalism is that it allows only to one people — the Arabs … a past, and sacred places, pilgrimages and earth reverences. These sacred Arab places have to be the sacred places of all the converted peoples. Converted peoples have to strip themselves of their past … It is the most uncompromising kind of imperialism." (V.S. Naipaul, *Beyond Belief, Islamic Excursions among the Converted Peoples*, Abacus, United Kingdom 2002, p.72).

- Restrict the source authorities to the *Qur'ān* and the 'strong' *Hadīth* and consensus of Prophet's Companions, as constituting the sole bases for *Sharī'a* and for how the Muslim should live;
- Avoid *taqlīd* (the imitation of conclusions and analyses of earlier Islamic authorities without examination of their reasoning) of the four legal schools, since the textual sources are clear enough as they stand;
- Re-introduce *ijtihād* (making a legal decision through independent interpretation of the legal sources)
- Upgrade the study and use of Arabic (held to have declined since the source scriptures were recorded) so as to ensure the correct interpretative method.

In so doing the educator can focus on salient features in their doctrinal approach, their *minhāj*, and, importantly, on the implications of their departure from the consensus as it manifests itself on three fronts: on *social cohesion, political activism* and ultimately on *political militancy.*

The implications for social cohesion

One predictable by-product of the Salafist approach and its repudiation of the more organic heritage of classical Islamic legal thought is self-isolation. As such, this has immediate negative implications for social cohesion. This is because the Salafist pre-occupation with authenticity and immunity from cultural contamination by the currently obtaining *jāhiliyya* places them in direct confrontation with those civic displines that are required in a contemporary state. In fact, the whole invitation to participate in the contemporary model of society, with its institutions deemed inauthentic to the historical heritage, is viewed as suspect.

This anti-contamination pre-occupation has led to the inevitable prioritisation of the culturally xenophobic doctrine of *al-walā' wal-barā'* ('Loyalty and Renunciation'). The effect of this doctrine, which derives from an era when cultural and religious conflict was considered the norm, is serious since acts to legitimise non-co-operation. And the educator can highlight how this doctrine contributes to a process of social disintegration.

For instance, the argument can be made that if the authenticity of a Muslim's Islamic faith is to be gauged like this according to his expression of love for anything or anybody defined as Islam or Muslim, and his hatred for that which is not, the 'true Muslim' cannot be permitted to acquiesce to a society and system that differs from the 'authentic' model. And this rejection, according to the doctrine, must take place on even the most trivial levels and irrespective of whether the 'system' is practically beneficial.[287] For which reason, mainstream scholars have consequently deplored the negative influence of Salafist values on social cohesion. "The principle is totalitarian", argues 'Abd al-Ḥakīm Murād,

> it's highly judgemental; it has no track record of dealing with other sorts of Islam or unbelievers with any kind of respect. If you are outside the small circle of the true believer you are going to hell and, therefore, you should be treated with contempt.[288]

As indicated above in the *Introduction* (Section II - *The damage wrought by Islamist education*), the educational and cultural orientations of the Salafists appear specifically designed *to* promote isolation. They may appear to lie well within a neutral zone of 'cultural activity', but the purpose of these activities – the call for isolation from contemporary institutions of government, for disassociation from non-Muslims in the pluralist environment, for the repudiation of the

[287] The imperative is traced by Salafists back to such works as Ibn Taymiyya's اقتضاء الصراط المستقيم لمخالفة أصحاب الجحيم (*'Cleaving to the Straight Path means Opposing the Inhabitants of Hell'*) where the Muslim is enjoined to "act differently from the others … Because being different from them brings us benefits and good in everything we do. Even the perfect things they do in their lives could be harmful to us in our Hereafter, or even more importantly in our daily lives, so remaining different from them will bring us goodness." خالفوهم ... فإذا المخالفة لهم فيها منفعة وصلاح لنا في كل أمورنا، حتى ما هم عليه من إتقان أمور دنياهم قد يكون مضراً بأمر الآخرة، أو بما هو أهم منه من أمر دنيانا. فالمخالفة فيه صلاح لنا. Ibn Taymiyya, اقتضاء الصراط المستقيم لمخالفة أصحاب الجحيم, *Minbar al-Tawḥīd wal-Jihād*, 1994, pp.39 and 43.

[288] 'Abd al-Ḥakīm Murād (Tim Winter), Interview for *Dispatches - Undercover Mosque* broadcast on 15 January 2007, Channel 4 TV, United Kingdom.

contemporary legal amalgam and for the development instead of parallel, autonomous structures — these can act only to weaken the civic disciplines necessary to a functioning modern state.

The implications for political activism and ultimately for militancy

There are further implications that the educator can demonstrate. For instance, since Islam is held to be a faith that does not confine its jurisdiction to the individual's personal conscience but must have a societal dimension, the *manhaj* of Salafism has to enter the political arena *malgré lui*. Although 'scholarly Salafism' (*al-salafiyya al-'ilmiyya*) avoids any overt interference with politics, its ambiguity on this question – at the same time as denouncing contemporary social and cultural *mores* – has been interpreted by some of its adherents as lending tacit approval to activism. The resulting complexion and commitment of the various Salafist trends and groups is only determined by how far their activities respond to the gravitational pull to enter into this arena. What is more, as contemporary developments have shown, those calling themselves Salafists are not above getting round the anti-contamination purism to argue for engaging pragmatically with the contemporary systems by calling on the principle of demonstrable public interest (*maslaḥa*).[289]

Among some Salafist thinkers the gravitational pull has led further. For these, the impulse to imitate the pristine model leads inexorably to the intensification of activism towards militancy, on the basis of the *da'wā-hijra-jihād* progression that they identify in the life of the Prophet. According to the militant current of Salafist thought – the branch known as *al-salafiyya al-jihādiyya* – the logic is authoritative: any exercise in modelling the true Muslim community on the Prophetic template (*'alā minhāj al-nabī*) must necessarily incorporate jihadist militancy, since by definition the early Muslim community was engaged in *jihād* as much as it was in *da'wā.*

The debate that that educator can raise here is the challenge being posed by the Jihadi-Salafists: how far can their activities claim scriptural legitimacy or immunity from criticism out of their claimed affiliation to the Salafist movement? The debate on this is still ongoing, and has recently been highlighted, for instance, by the comments of the former Imam of the Grand Mosque in Mecca Shaykh 'Ādil al-Kalbānī, when discussing the tactics of groups such as ISIS:

> They draw their ideas from what is written in our own books, from our own principles. He who criticises them the most does not criticise their thought, but their actions … the ideological origin is Salafism … they exploited our own principles, that can be found in our books, right among us. We follow the same thought but apply it in a refined way.[290] [xxi]

[289] This, for instance, is the position taken by currents of Salafism denoted as 'activist Salafism' (*al-salafiyya al-da'wiyya*). On this, see H.Mneimneh, 'The Spring of a New Political Salafism?' *Current Trends in Islamist Ideology*, Volume 12, October 2011.

[290] MBC TV interview (Dubai) 22nd January 2016. https://www.youtube.com/watch?v=GWORE6OBfhc

➢ *DISCUSSION POINT – Salafism, political activism and militancy*

The educator can here engage the students in a discussion on the merits of the pro-activist argumentation. The questions posed by the Salafist challenge, which is now a powerful force, relate to how far the trajectory towards activism, and ultimately militancy, is inherent to their movement, and the inevitable consequence of a doctrinal position that prioritises the unmediated letter of the Texts over the interpretative heritage.[291] The questions that can engage the student with a lively discussion include the following:

- Does the disengagment of *al-salafiyya al-'ilmiyya* from the systems and institutions of contemporary society go beyond the impulse to reform and promote a position of hostility? Does this impulse put the individual onto a trajectory that can ultimately lead to activism and ultimately to radicalisation?
- What would be the approach to take to delegitimise the activist Salafists (*al-salafiyya al-da'wiyya*) from political activities that threaten to damage social cohesion and the functioning institutions of the state in the Muslim world?
- How coherent is the Jihadi-Salafist claim to be able to 'out-authenticate' the scholarly Salafists and the activist Salafists? Does either of these Salafisms have a satisfactory answer to this claim?
- If 'authenticity' is the aim, how can contemporary Muslim thinkers effectively respond to the claim, proferred by the *Jihadi-Salafists*, that since the first Muslim community was historically a society at war, the model for emulation must therefore include the characteristics of a society of *mujāhidīn*?
- How cogent is the argument of the *Jihadi-Salafists* that they can claim for themselves the denomination of *Ahl al-Ḥadīth* (people of Hadith), *al-Ṭā'ifa al-Manṣūra* (the Group Granted Victory), *al-Firqa al-Nājiya* (the Saved Sect), and "those who follow the creed or way of the *Sunna* and *Jamā'a"*?
- How would students view the evaluation by Dr. Muḥammad al-Mutawakkil that "the Salafists and al-Qāʿida are like the two faces of the moon ... The Salafists are the light face and al-Qāʿida is the dark face. They have the same culture"?[292] Or the comment by Shaykh 'Ādil al-Kalbānī that Salafists "follow the same thought but apply it in a refined way"?
- What would be the approach to take to counter the claims of the *al-salafiyya al-jihādiyya* to genuine adherence to the Salafī *madhhab*?

C3.2.4 - The Islamist detour

At this point, the educator can progress onto the more overt political implications of the Salafist current and how these manifested themselves in the various complexions of Islamism. He may illustrate how the Salafist foundations for the rejection of *taqlīd*, the marginalisation of the four canonical schools of legal thought, and the rejection of the corpus of traditional scholarship in favour of a *sola scriptura* approach, opened the way to the politicisation and instrumentalisation of Islamic law. This road to politicization, as Wael Hallaq explains, began at the moment when the reforms demanded during the colonial and early post-colonial periods allowed the emerging Muslim states to appropriate the law as a legislative tool.[293] As a result of the process of entexting (see units *C3.1.1* and *C3.1.3* above) the scope of Sharīʿa theory narrowed considerably, and its

[291] Cf. the comments by 'Abd al-Ḥakīm Murād: "The … widening of the argument on even the most simple juridical matters is no longer tempered by the erstwhile principles of politeness and toleration … Other examples of this bitter hatred generated by the non-Madhhab style of discord, based in attempts at direct *istinbat*, are unfortunately many. Hardly any mosque or Islamic organization nowadays seems to be free of them." 'Abd al-Ḥakīm Murād, *Understanding the Four Madhhabs: The Facts about Ijtihad and Taqlid*, Muslim Academic Trust Papers, 1999. http://masud.co.uk/understanding-the-four-madhhabs-the-problem-with-anti-madhhabism/

[292] Dr. Al-Mutawakkil is a Yemeni political science professor at Sanʿā University. See S. Raghavan, "Yemen's alliance with radical Sunnis in internal war poses complication" *Washington Post*, February 11th, 2010.

[293] Wael Hallaq, *An Introduction to Islamic Law*, Cambridge University Press, Cambridge, New York, 2009, pp.169-170.

new rigidity lent itself to being turned into an 'ideology' for the new, idealised *umma* that the Islamist thinkers proposed.

If the idealised *umma* was to take shape, some hermeneutical transformations had to be undertaken in order to turn the Qur'ān into a 'political manifesto'. Accordingly, the major figures of the Islamist movement such as Abū al-Aʿlā Mawdūdī (1903–79) in his *Tafhīm al-Qur'ān* ('Understanding the Qur'ān') and Sayyid Quṭb (1907–66) in his *Fī Ẓilāl al-Qur'ān* ('In the Shade of the Qur'ān') sought to discern in the Revelation a vocabulary of militancy. "None of the early Muslims came to the Qur'ān to increase his knowledge", argued Sayyid Quṭb,

> rather, he turned to it to find out what the Almighty Creator has prescribed for him and for the group in which he lived, for his life, and for the life of the group. He approached it to act on what he heard immediately, as a soldier on the battlefield reads 'Today's Bulletin'" [294] xxii

The vocabulary of the era of the Prophet thus became transformed into supra-historical verities. These described a series of permanent states: the struggle of Light against Darkness, the separation (*hijra*) from the cultural contamination of the anti-Islamic, ignorant (*jāhiī*) contemporary world, and the salvific strategy of *da'wā-hijra-jihād.* These constituted the divinely vouchsafed formulæ for triumph that must be revived.[295]

Muslim scholars have noted the implications of this Islamist telescoping of history – in which the original template for a culturally uncontaminated Muslim society is made to leap-frog over the legacy of legal thought elaborated through centuries of real human experience – so as to set the model for a new society and politics. Along with it, they discern, comes a rehearsal of the destructive doctrines of the early Khārijīs[296] with their condemnation of Muslims as infidels (*takfīr*) for falling short of their maximalist conceptions of Sharīʿa and theocracy.

This telescoping is a favourite feature of Islamist thought, and has engendered an entire hermeneutical discipline of *fiqh al-wāqi'* (*'t*he Jurisprudence of Contemporary Affairs'). Shaykh Nāṣir al-ʿUmar, for instance, in his 1992 treatise *The Jurisprudence of Contemporary Affairs: its Foundational Principles, Influences and Sources* makes the case that the present Muslim 'defeat' stems from "the distance of the Nation, in terms of rulers and the ruled, from the guidance of the Holy Book and the Sunna, and the practices of the Salaf." He states this on the grounds that the Revelation

> is the guide for all things, the aid to understand every issue. If we take, for example, the issue of modernity, and wish to analyse it, and study the truth concerning it and its destiny, it is by [God's book] that such things find their explanation.[297] xxiii

The educator can illustrate how the entire edifice of jihadist thought is founded upon this instrumentalisation – and weaponisation – of *fiqh al-wāqi'*.[298] At its most extreme, this

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[294] See Sayyid Quṭb, مَـعَالِم في الطَـريق (*Milestones on the Way*), p.13, Indianapolis: American Trust Publications, 1990).

[295] Sayyid Quṭb gives an extended analysis of why the formula is not at present functioning in his Qur'ānic commentary: "The victory may be being delayed since the falseness of the Evil which the believing Nation is combating has not been completely exposed, and that were the believers to prevail at the moment this Evil might yet find supporters among those easily deceived, those still unconvinced of its corruptive influence and of the need to remove it. It may thus retain roots among the souls of the innocent to whom the truth has not been revealed, and God therefore wishes to preserve the Evil until it can be revealed in all its nakedness to people, and pass away un-mourned by the rest!" وقد يبطئ النصر لأن الباطل الذي تحاربه الأمة المؤمنة لم ينكشف زيفه للناس تماما. فلو غلبه المؤمنون حينئذ فقد يجد له أنصارا من المخدوعين فيه، لم يقتنعوا بعد بفساده وضرورة زواله؛ فتظل له جذور في نفوس الأبرياء الذين لم تنكشف لهم الحقيقة. فيشاء الله أن يبقى الباطل حتى ينكشف عاريا للناس، ويذهب غير مأسوف عليه من ذي بقية! (Sayyid Quṭb, في ظلال القرآن , IV, (*Tafsīr sūrat al-Ḥajj*) 2426-2428).

[296] The 'Exiters' or 'Seceders' who staged a military standoff on the question of the succession following the death of the Prophet Muhammad. Their *casus belli* for rebellion was the Qur'ānic verse: وَمَن لَّمْ يَحْكُم بِمَا أَنزَلَ اللَّهُ فَأُوْلَـئِكَ هُمُ الْكَافِرُونَ: *'Whose judgeth not by that which Allah hath revealed: such are the disbelievers'* [*al-Mā'ida*, V,44]. The issue thrown up by this verse has never been fully resolved, and forms the starting-point for Islamism.

[297] Nāṣir bin Sulaymān bin Muḥammad al-ʿUmar, فقه الواقع مقوماته وآثاره ومصادره, p.32 (based on the electronic pagination of https://islamhouse.com/ar/books/337577/).

[298] Other proponents of this theorisation include the Jordanian scholar 'Alī Ḥasan al-Ḥalabī who argues for "contemporary struggles with the enemies of God to be compared to the early struggles [since] "whatever the differences in form and however many the shapes the situation is one and the same!" فقه الواقع بين النظرية والتطبيق, دراسات في السياسة الشرعية) مهما تغيرت الصور ومهما تعددت الأشكال فالحال هو الحال *'The Jurisiprudence of Contemporary Affairs between Theory and Application' – Studies in Islamically Legitimate Politics, III,*

weaponisation morphed into the apocalypticism of ISIS and their pre-occupation with the 'Last Signs of the Hour' and the final conflagration at *Dābiq*, where the Great Slaughter (*al-malḥama al-kubrā*) was to take place.[299]

Western scholars, meanwhile, have noted how certain conspicuous features of the Islamist programme – notably the comprehensiveness of the political formula to regulate all aspects of life,[300] the perception of the world order undergoing an existential crisis, the task to dismantle the world order and build it anew, the repudiation of universal values, rights, democracy and pluralism and the sacralisation of a corporate society – all these features seem to follow the trajectory of totalitarian thought familiar from the 20th century European experiments.[301]

➢ *DISCUSSION POINT – Islamism and Totalitarianism*

The educator can here engage the students in an important discussion raised by the comparison between Islamist political programmes and 20th century European totalitarianisms. As a preliminary to the debate, the educator can flag up some thought-provoking parallels such as the following:

- *The contemporary world and its values are undergoing a crisis* – which only a total values-system can cure;[302]
- *The contemporary world order is to be built anew* after the dismantling of the old;[303]
- *So called 'universal values' and 'rights' are to be repudiated* – since the criterion for right and wrong is not the *Golden Rule* but rather the progress of the mission as defined by the group;
- *A single, supreme ideology must be established* – and this must be presented as a universal explanation and filter to explain reality now, in the past, and in the future;[304]

Ramallah, 2nd Edition, 1420 AH), p.34). Note also the jihādi strategist Abū Muṣʿab al-Sūrī in his comprehensive *Call for Global Islamic Resistance* against the eternal conflict between Muslims and infidels "which has persisted right since the combat between the two sons of Adam, where Cain the evil one slew his righteous brother Abel". (قابيل) لمسار الصراع منذ تقاتل ولدا آدم عليه السلام وقتل الشرير منهما (هابيل) أخاه الصالح , (Abū Musʿab al-Sūrī, دعوة المقاومة الإسلامية العالمية *The Global Islamic Resistance Call*, p.196).

[299] Their fixation was based on the famous *ṣaḥiḥ* hadīths that tell of "an army consisting of the best (soldiers) of the people of the earth at that time will come from Medina (to counteract them) …They will then fight and a third (part) of the army would run away, whom Allah will never forgive. A third (part of the army) which would be constituted of excellent martyrs in Allah's eye, would be killed and the third who would never be put to trial would win and they would be conquerors of Constantinople." فَيَخْرُجُ إِلَيْهِمْ جَيْشٌ مِنَ الْمَدِينَةِ مِنْ خِيَارِ أَهْلِ الأَرْضِ ... فَيُقَاتِلُونَهُمْ فَيَنْهَزِمُ ثُلُثٌ لاَ يَتُوبُ اللَّهُ عَلَيْهِمْ أَبَدًا وَيُقْتَلُ ثُلُثُهُمْ أَفْضَلُ الشُّهَدَاءِ عِنْدَ اللَّهِ وَيَفْتَتِحُ الثُّلُثُ لاَ يُفْتَنُونَ أَبَدًا فَيَفْتَتِحُونَ قُسْطُنْطِينِيَّةَ . (Ṣaḥiḥ Muslim, *The Book of Tribulations and Portents of the Last Hour*, Hadith no. 2897).

[300] A typical formula is that expressed by Muhammad Al Alkhuli: "Islam is a religion that organizes all aspects of life on both the individual and national levels. Islam organizes your relations with God, with yourself, with your children, with your relatives, with your neighbor, with your guest, and with other brethren. Islam clearly establishes your duties and rights in all those relationships. Islam establishes a clear system of worship, civil rights, laws of marriage and divorce, laws of inheritance, code of behavior, what not to drink, what to wear, and what not to wear, how to worship God, how to govern, the laws of war and peace, when to go to war, when to make peace, the law of economics, and the laws of buying and selling. Islam is a complete code of life". (Dr.Muhammad Al Alkhuli, *The Need for Islam*, published on *Islamway* on August 21st 2008).

[301] The frequent citation of Mawdūdī's statement (*"Islamic Law and Constitution,"* Chapter: *The Political Theory of Islam*, 9th edition, Lahore 1986, p146-147) that his Sharī'a state "seeks to mould every aspect of life and activity…[in which] no one can regard any field of his affairs as personal and private. Considered from this aspect, the Islamic State bears a kind of resemblance to the Fascist and Communist states" is the subject of dispute. Yet the issue is wrongly considered to be controversial, because of distractions onto the issue of the nation-state (in the case of Fascisms) or atheism (in the case of Marxism-Leninism). The parallel is best understood as pointing out some parallel mechanisms, not with a complete 'fit' with either of these systems. For more detail on these features, see S. Ulph, *Islamism and Totalitarianism: The Challenge of Comparison*, The Westminster Institute, VA and Isaac Publishing, May 2012, pp.45-75. See also S. Ulph, تقديس السياسة أم تسييس المقدّس: مقاربة مقارنيّة ('*Sacralised politics, and the politicised sacred – a comparative approach'*) in R. Ben Salama, المقدس وتوظيفه ('*The Sacred and its Instrumentalisation'*), University of Manouba Press, Tunis 2015, pp.101-118. Online publIcation: https://www.alhiwartoday.net/node/11183 '

[302] Sayyid Quṭb: "The phase of the dominance of the white man is now ended", لقد انتهى العصر الذي يسود فيه الرجل الأبيض (المستقبل لهذا الدين) '*The Future of this Religion'*, p.31), its power is an illusion due to its 'lack of values' and the world stands "on the edge of the abyss" تقف البشرية اليوم على حافة الهاوية (Sayyid Quṭb, مَـعَالِم في الطَـريق '*Milestones on the Way*', *Minbar al-Tawḥīḍ wal-Jihād*, Introduction, p.2).

[303] For Sayyid Quṭb it is a 'comprehensive revolution' "in the government of mankind in all its guises, forms, systems and situations, and a complete rebellion against every situation throughout the earth." الثورة الشاملة على حاكمية البشر في كل صورها وأشكالها وأنظمتها وأوضاعها والتمرد الكامل على كل وضع في أرجاء الأرض (Sayyid Quṭb, مَـعَالِم في الطَـريق, p.37).

- *This single, supreme ideology is unadulterated by diversity and repudiates it;* [305]
- *The public and private spheres are to be inseparable* – since these are the hallmark of repudiated liberalism.[306]
- *The intellect of the individual in the new order must be transformed* – there must be a re-birth into a new truer man, one who is freed from the hypocrisy of a fake identity;[307]

In conducting the discussion the educator may pose some stimulating questions concerning the propriety and usefulness of the comparison, such as the following:

- Can totalitarian ideologies and religious beliefs be compared? Can a reigious ideological programme be equated to a mundane one? Is this a proper field of discussion?
- Is religious belief any more immune than other systems of belief to being passed through a totalitarian filter by adherents who have their own preconceptions or how it should be practiced and applied?
- Islamists define their movement as *authentic, uniquely Islamic and divinely sanctioned.* If it can be demonstrated that their ideology shows identical patterns of thought to man-made, infidel political ideologies of the 20th century, does this mean that their claim is compromised?
- Does this mean that the core features of Islamism and militant Jihadism are manifestations of a commonly found human deviation?[308]

The wave of intolerance towards diversity that these instrumentalised developments of auto-scholarship have caused, is now a major issue of concern to religious thinkers and authorities. The 2004 *Amman Message* was an attempt to address these concerns by seeking a formula for defining "what Islam is and what it is not, to separate out what has been wrongly associated with Islam, and what actions represent Islam and what actions do not".[309] Its task, essentially, was to counter the increasing wave of sectarian tensions and gain some control over anarchic auto-scholarship by promoting three essential positions: 1) recognition of the validity of all eight legal

[304] For Islamists the universal explanation is the slogan *al-Islām huwa al-ḥall* ('Islam is the solution') and the historical dimension of the explanation is provided by the *fiqh al-wāqi'* pre-occupation of Islamist thinkers.

[305] Taqī al-Dīn al-Nabahānī (the founder of *Hizb al-Tahrīr*) illustrates this instinct well – "The Muslims themselves were not affected by any other culture, neither in terms of their way of thinking or in their understanding of Islam. The mentality of the Muslims remained a pure Islamic mentality". (Taqī al-Dīn al-Nabahānī, الشخصية الاسلامية Part One, Hizb al-Tahrir Publications, Dar al-Umma, Beirut, 6th ed. 2003, pp.273-284. Tr. *The Islamic Personality*, pp. 153-8). For the German totalitarians the culprits were Jewish intellectuals and their 'degenerate arts', and their goal was to create a harmonious community whose values were unsullied by differences of culture and deviant ideologies.

[306] The 'sacralisation of a corporate society' is a common feature of totalitarianism For the German totalitarians it was the *Gleichschaltung* (coordination) of every possible aspect of life in the state, for the purpose of eliminating individualism. Similarly, Sayyid Quṭb had no place for *al-fiṣām al-nakid* ('hideous schizophrenia') and the reformed society "is not achieved by just establishing the theoretical base in the hearts of individuals, no matter how many they are, if they are not represented in a coherent, cooperative organic group that has an independent self-existence, whose members work organically like members of a living organism." لا يتحقق بمجرد قيام القاعدة النظرية في قلوب أفراد مهما تبلغ كثرتهم، لا يتمثلون في تجمع عضوي متناسق متعاون، له وجود ذاتي مستقل، يعمل أعضاؤه عملاً عضوياً- كأعضاء الكائن الحي (Sayyid Quṭb, مَـعَالِم في الطَـريق, *Minbar al-Tawḥīḍ wal-Jihād*, p.31).

[307] For Mussolini, there is to be an 'anthropological revolution' whereby the believer undergoes a 're-birth' (palingenesis) into a new being as part of the homogenisation of society, a revolution that was "not only of the forms of life but their content - man, his character, and his faith." For the Islamist, the new Muslim is to leave behind the jāhiliyya of his earlier life. Cf. Sayyid Quṭb: "This miserable state that mankind suffers from will not be alleviated by minor changes in the minutiæ of systems and conditions. Mankind will never escape it without this vast and far-reaching transformation."

[308] An interesting example of the nexus between the allure of apparent authenticity and profundity and the destruction of ethics and conscience can be seen in the case of the German philosopher Martin Heidegger. Impressed by the German totalitarians' rhetoric of rebirth and the intensity and authenticity of "a new essence of truth" over sympathy and equality, Heidegger valued (in much the same type of language as employed by Sayyid Quṭb) the "marvelously awakening communal will penetrating the great darkness of the world".

[309] وغايتها أن تعلن على الملأ حقيقة الإسلام وما هو الإسلام الحقيقي ، وتنقية ما علق بالإسلام مما ليس فيه، والأعمال التي تمثّله وتلك التي لا تمثّله. The official website of the Amman Message is http://ammanmessage.com/

schools of Sunni, Shīʿa and ʻIbāḍī Islam, Ashʿarism, Sufism and 'true Salafi thought';[310] 2) prohibition of *takfīr* between Muslims; 3) the establishment of concrete pre-conditions for the issuing of *fatwās*.

What initiatives such as the Amman Message are doing is identifying the gap that has opened up – since the colonial period and the early attempts at an amalgam – between the authority of the classical legal tradition and the entirely different environment that this tradition was now expected to address. The educator can highlight how this gap has brought about two parallel, and mostly antagonistic, currents of thought and approaches to law:

1. the traditional '*ulamā'* – maintaining at least a semblace of traditional methodology and the authority of their legal sources and treatises, their leading schools and jurists, thus remaining loyal to their area of specialisation but practically diverted from the application of law in contemporary life;
2. the *Islamists* – trained mostly in a variety of modern technical disciplines such as engineering, medicine and accountancy (very infrequently in Islamic law), thus no longer operating within the cultural and epistemic systems developed throughout the course of Islamic intellectual and legal history and instead remaining loyal to their own area of specialisations and willing to employ any modern interpretive amalgam.[311]

Despite the efforts expended by such initiatives as the Amman Message for providing inclusive parameters for Islam, there has yet to emerge a cultural and political current that goes any deeper towards resolving the tensions raised by instrumentalised auto-scholarship beyond those addressing pragmatic implications for security and public order. The mushrooming proliferation of *fatwās* in print media and in textual or audio-visual form on the Internet, demonstrates the result of a claimed religious expertise that is unfiltered by classical training. The British scholar ʻAbd al-Ḥakīm Murād has tersely summarised the effects of this:

> With every Muslim now a proud *mujtahid*, and with *taqlid* dismissed as a sin rather than a humble and necessary virtue, the divergent views which caused such pain in our early history will surely break surface again. Instead of four madhhabs in harmony, we will have a billion madhhabs in bitter and self-righteous conflict. No more brilliant scheme for the destruction of Islam could ever have been devised.[312]

Module C3.3 – THE CHALLENGES OF A RELIGIOUS LAW IN THE CONTEMPORARY ENVIRONMENT

C3.3.1 – The Islamic jurisprudent in the contemporary Muslim state

It is clear that the conditions in which jurisprudents of the classical tradition have functioned no longer apply. The process of the amalgam has prioritised statutory legislation, and the role of interpreting the statute has also been assigned to the courts of law. This has relegated the role of the *mujtahid* to the margins – in many cases to entirely academic margins. This is confirmed by the fact that many modern constitutions in Islamic countries are totally silent on *ijtihād.*[313]

In addition, the problems thrown up by auto-scholarship as a response to the failure of the classical legal heritage to keep pace with modern developments has underscored how the *ijtihād*

[310] By this was intended the scholarly Atharism of, for instance, the Ḥanbalīs and their successors, rather than the 'neo-Atharīs' of contemporary Islamists who are considered to draw their inspiration, ultimately, from the dissident scholarship of Ibn Taymiyya, Ibn Qayyim al-Jawziyya and in part from the later influence of Muḥammad ibn ʿAbd al-Wahhāb.

[311] On this, see Wael Hallaq, *An Introduction to Islamic Law*, Cambridge University Press, Cambridge, New York, 2009, pp.141-2.

[312] ʻAbd al-Ḥakīm Murād, *Understanding the Four Madhhabs: The Facts about Ijtihad and Taqlid,* Muslim Academic Trust Papers, 1999, p.17. http://masud.co.uk/understanding-the-four-madhhabs-the-problem-with-anti-madhhabism/

[313] M. H. Kamali, *Principles of Islamic Jurisprudence*, The Islamic Texts Society, Cambridge 2005, *online text* p.337.

practiced by the jurisprudents is no longer suitable to modern conditions and the complexities of the modern state.[314]

Legal reformers therefore argue that to re-insert the *mujtahid* into the legal sphere would require considerable reform in training on two fronts: *internal* – the settlement of the unresolved debate on *ijtihād* and *taqlīd*; and *external* – the unresolved issue of legal specialisation.

Taking the first front, clarifying the relationship between *taqlīd* and *ijtihād*, the debate on the *madhhab* is still very much alive. The anti-*taqlīd* theorists employ a body of scriptural argumentation[315] and those in support of *taqlīd* employ their own.[316] Defenders of *taqlīd* make the point that a layman can hardly be expected to be familiar with the methodology for determining the scriptural proof himself,[317] nor even decide *whether* to accede or not to the judgement – an *ijtihād* – of someone else. They list the training required for the process:

- Mastery of the Arabic language and its nuances, so as to minimise the possibility of misinterpreting the primary scriptural sources;
- Knowledge of the Qur'ān, the context of the Makkan and Madīnan verses, the reason for their being revealed (*the asbāb al-nuzūl*) or abrogated;
- A full knowledge of Qur'ānic *tafsīr* and the evaluation of the ḥadīth with respect to the soundness or weakness of their chain of transmission (*isnād*);
- Knowledge of the views of the *Ṣaḥāba*, the *Tābi'īn*, and the great Imams, along with a knowledge of cases where a consensus (*ijmā')* has been reached;
- Knowledge of Islamic legal theory (*uṣūl al-fiqh*) so as to identify what texts are general, specific, absolute, or qualified;
- An understanding of the *maqāṣid al-Sharī'a* (general objectives), its balancing with the public interest (*maṣlaḥa*), and experience in the employment of juridical analogy (*qiyās)* to achieve that interest.

The defenders also adduce the evidence of authoritative scholars such as al-Ghazālī, [318] but also make the case that even those commonly adduced to justify the prohibition of *taqlīd* such as the medieval authorities Ibn Taymiyya and Ibn al-Qayyim or their modern adherents Ibn Bāz,[319]

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[314] On this, see Sulaymān al-Tamāwī, السلطات الثلاث في الدساتير العربية المعاصرة وفي الفكر السياسي الإسلامي : تكوينها واختصاصاتها والعلاقة بينها Dār al-Fikr al-ʿArabī, 1996, p.307.

[315] These include evidences such as Qur'ān II (*al-Baqara*) 170: *"And when it is said unto them: Follow that which Allah hath revealed, they say: We follow that wherein we found our fathers. What! Even though their fathers were wholly unintelligent and had no guidance?"* وَإِذَا قِيلَ لَهُمُ اتَّبِعُوا مَا أَنْزَلَ اللَّهُ قَالُوا بَلْ نَتَّبِعُ مَا أَلْفَيْنَا عَلَيْهِ آبَاءَنَا أَوَلَوْ كَانَ آبَاؤُهُمْ لَا يَعْقِلُونَ شَيْئًا وَلَا يَهْتَدُونَ and the Ḥadīth: *Sunan Abī Dāwūd* 3567 and *Sunan an-Nasā'ī* 5381: *"If an adjudicator passes judgment and strives to reach the right conclusion and gets it right, he will have two rewards; if he strives to reach the right conclusion but gets it wrong, he will still have one reward."* إذا اجتهد الحاكم فأصاب فله أجران، وإذا اجتهد فأخطأ فله أجر

[316] These include: Qur'ān (*al-Nisā'*) 59: *"O you who believe! obey Allah and obey the Messenger and those in authority from among you"* ; يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ Qur'ān XXI (*al-Anbiyā'*) 7*: "So ask the followers of the Remembrance if you do not know"* فَاسْأَلُوا أَهْلَ الذِّكْرِ إِنْ كُنْتُمْ لَا تَعْلَمُونَ and the Ḥadīth: *Sunan Abī Dā'ūd* 336: *"Could they not ask when they did not know? The cure for not knowing is asking."* أَلاَّ سَأَلُوا إِذْ لَمْ يَعْلَمُوا فَإِنَّمَا شِفَاءُ الْعِيِّ السُّؤَالُ; Ṣaḥīḥ al-Bukhārī, 71: "*Whoever Allah wishes good for, He grants him deep understanding (fiqh) of the Religion"* مَنْ يُرِدِ اللَّهُ بِهِ خَيْرًا يُفَقِّهْهُ فِي الدِّينِ .

[317] Al-Nawawī in his Commentary of the *Ṣaḥīḥ Muslim*, dismisses the use of the hadith of 'two rewards and one reward' (see footnote above) on the grounds that "by the consensus of the Muslims this hadith is exclusively about the learned scholar who is qualified to judge" and that "as for the one who is not qualified to make a judgement, there is no reward for him, rather he has committed a sin." See Muhammad Sajaad, *Understanding Taqlid, Following One of the Four Great Imams*, E-book, 1432/2011, p.19.

[318] Al-Ghazālī argued that *taqlīd* ('imitation') was for practical reasons obligatory: "it is more than obvious that not every person is capable of becoming an expert in law: Making it obligatory upon a layman to attain the status of *ijtihād* is asking him to do the impossible because it will lead people to abandon their respective professions as well as making families and the whole system will collapse because everyone would devote his skills to acquire the knowledge of law. Moreover, it will also lead the scholars to leave the intellectual work and turn to the worldly affairs. As a result, the knowledge of law will vanish." Al-Ghazālī, *Al-Mustaṣfā min 'Ilm al-Uṣūl*.

[319] "To sum up: making *taqlīd* of a person known for their learning, virtue and firmness upon the creed is allowed by necessity. This was clarified by the learned scholar, Ibn al-Qayyim, may Allah have mercy upon him, in his book, *I'lām al-Muwaqqi'īn*." وإنما قصارى الأمر ان يكون التقليد سائغا عند الضرورة لمن عرف بالعلم والفضل واستقامة العقيدة كما فصل ذلك العلامة ابن قيم مرمه الله في كتبه إعلام الموقعين (Ibn Bāz, مجموع الفتاوى ومقالات متنوعة, Riyadh: Dār al-Qāsim 1420, Vol III, p.52).

Ṣāliḥ ibn al-'Uthaymīn[320] and al-Albānī[321] – these themselves tempered this prohibition on the basis of practicality.

Even where the issue of *ijtihād* is accepted, the deeper point of contention in this debate is the uncertainty over the unity or plurality of truth: has the Divine Legislator predetermined a specific solution to every issue, which alone may be regarded as right? If so, is the *mujtahid* therefore in danger of committing a sin in the performance of what is a sacred duty?

The *'two-rewards – one reward'* argument of the famous Ḥadīth concerning leniency for the possible error of the *mujtahid*[322] has been traditionally conditioned by whether it refers to matters which are determined by a clear and definitive text, or matters on which no decisive ruling is found in the scriptural sources. The Ashʿarīs and the Muʿtazila opted for latitude on the latter, although the founding Imams of the major schools, and many other *'ulamā'* besides, remained wary of the implication that there might be as many truths as there are *mujtahids*, and thus maintained that only one of several opposing views on a matter can be said to be correct.[323]

The issue of widening the education of the mujtahid

Turning now from the relationship of the *faqīh* to the classical body of law, to the second front – his relationship with the contemporary environment in all its complexity – what should he be expected to know? If the practice of *ijtihād* is to be restored back from the margins to the centre ground the parameters of *ijtihād* itself have to be reconsidered. Theoretically, once a person had fulfilled the necessary conditions of *ijtihad* he was qualified to practice it in all areas of the *Sharī'a.* The intellectual ability and competence of a *mujtahid* could not be divided up into compartments. A *mujtahid* in *one* area of matrimonial law was not allowed to be an imitator (*muqallid*) in another, since ignorance displayed anywhere would compromise his ability and prestige in another. *Ijtihād*, in other words, is indivisible.

This rule, however, was honoured more in the breach, and some major figures disputed it, including al-Ghazālī.[324] On the basis of the practical reality of *ijtihād* over history, contemporary reformers make the case for extending the training of the *faqīh* into areas that have not traditionally formed part of the curriculum.

A principal area for inclusion is training in the modern legal disciplines as currently employed by contemporary Muslim states. The reality today is that universities and legal training institutions in many Muslim majority countries are committed to the training of lawyers and barristers in modern systems of law. The argument for including modern law in the training of the *faqīh* is that the process will enrich both jurisprudential arenas. It would increase the competence of the *faqīh* to source those elements of the Sharī'a heritage that have a positive contribution to make, and at the same time credibly authenticate current legal practices in the modern state. The deepening of the amalgam from the arena of legal practice to legal theory and education would be an important step forward; it would remove the tensions and the resistance to indigenising contemporary law into the common heritage of Muslims, and restore contemporary relevance to the *faqīh*. M. H.

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[320] *"Taqlīd* takes place in one of two cases: The first: that the *muqallid* is a person from the general populace who is unable to know the ruling by himself, and so is forced into *taqlīd* … The second: that the *mujtahid* is faced with an incident that requires an immediate response and he is unable to investigate it [fully]; it is permissible for him to resort to *taqlīd* [of another *mujtahid*] at such a time." يكون التقليد في موضعين: الأول: ان يكون المقلد عاميا لا يستطيع معرفة الحكم بنفسه, ففرضه التقليد ... الثاني: ان يقع للمجتهد حادثة تقتضي الفورية, لا يتمكن من النظر فيها فيجوز له التقليد حينئذ (Ibn 'Uthaymīn, علم الأصول من الأصول p.87).

[321] Section: 'Taqlīd is permitted to someone incapable of arriving at the proof for themselves' (جواز التقليد للعاجز عن معرفة الدليل) in الحديث - حجة بنفسه في العقيدة والأحكام (Riyadh, Maktabat al-Maʿārif, 1425/2005, p.80).

[322] See preceding footnotes.

[323] M. H. Kamali, *Op. cit.*, p.331

[324] "In my opinion, *ijtihād* is not an indivisible position. Rather, it is permissible for a scholar to be called to take a position on *ijtihād* in some rulings rather than others. Similarly, one experience in the technique of *qiyās* may issue fatwas on *qiyās*-related issues, even if he may not be skilled, say, in *ḥadīth* scholarship." وليس الاجتهاد عندي منصبا لا يتجزأ بل يجوز أن يقال للعالم بمنصب الاجتهاد في بعض الأحكام دون بعض فمن عرف طريق النظر القياسي فله أن يفتي في مسألة قياسية وإن لم يكن ماهرا في علم الحديث See Al-Ghazālī, المستصفى من علم الأصول, (Ed. Dr. N. al-Suwayd), Vol.2, p.298ff for his discussion on this.

Kamali in *Principles of Islamic Jurisprudence*, argues that state support for such a programme will play a positive role in preserving and indigenising the best of either heritage:

> To initiate a comprehensive and well-defined programme of education for prospective *mujtahids*, which would combine training in both the traditional and modern legal disciplines, would not seem to be beyond the combined capabilities of universities and legal professions possessed of long-standing experience in Islamic legal education.[325]

Thus modern Muslim reformers are less and less calling for the replacement of statutory law with Islamic law and more for the establishment of universally recognised councils of qualified *mujtahidīn* to provide an advisory role in the preparation and approval of statutory law, so as to ensure its harmony with *Sharī'a* principles.

C3.3.2 – Islamic law in the contemporary Muslim state

The question of harmonising two systems of law, however, is complicated by the evident fact that the contemporary context did not exist at the time either of the primary legislation of the Revelation, or its elaboration in the classical period. How then can a religious law apply to this modern environment?

The educator can here engage a debate with the students on a number of issues that are thrown up by the question of Islamic law and its role in the modern world. These issues include:

- The role of historical consensus (*ijmā')* as a legal argumentation;
- Authenticity and the challenge of archaism;
- The strength of the orthodox case: the Texts
- The 'pragmatism' argument of the reformers

The role of historical consensus (ijmā') as a legal argumentation

The role of *ijmā'* in Islamic law is a good example of the dilemma facing proponents of Sharī'a law in the contemporary context. The core argument for *ijmā'* – that the Islamic community collectively could never agree on an error – could have highly negative implications for legal flexibility and adaptation. Al-Shāfi'ī had considered the Qur'ānic verse IV (*al-Nisā'*) 115 condemning those who "*follow a way other than that of the believers*"[xxiv] as indicating that disobedience to the *ijmā'* placed one in a state of *kufr*[326] and a number of hadith in support of this sentiment appear to reinforce the case against diversity.[327]

Modern Muslim critics argue that *ijmā'* was never unequivocally defined for this warning to be operative (see above unit *C2.2.3 - The categorisation of authority beyond scripture: ijmā'*), and that even in the classical period *ijmā'* was claimed for rulings on which only a majority consensus had existed within or beyond a particular school. Moreover, despite the threats of divine sanction, the proof and authenticity of *ijmā'* has never received the kind of attention that has been given to the authentication of Ḥadīth.

On the level of pragmatism, these critics consider that *ijmā'* according to its classical definition fails to relate to the search for finding solutions to the problems of the community in modern times. Moreover, the process of assembling a consensus is simply too slow to be practical, tends to be a retrospective exercise and entails a number of uncertainties that make the process less

[325] M. H. Kamali, *Principles of Islamic Jurisprudence*, The Islamic Texts Society, Cambridge 2005, *online text* p.338).

[326] The danger of this position was signalled by Muḥammad 'Abduh who argued that to quote this *āya* in support of *ijmā'* leads to irrational conclusions, for it would amount to drawing a parallel between those who are threatened with the punishment of Hell and a *mujtahid* who differs with the opinion of others. See Kamali, *op cit*, *online text* p.164.

[327] For example: *"The Hand of Allah is with the Community, and Shaitan is with the one who splits away from the Community and runs alongside him"* فَإِنَّ يَدَ اللَّهِ عَلَى الْجَمَاعَةِ فَإِنَّ الشَّيْطَانَ مَعَ مَنْ فَارَقَ الْجَمَاعَةَ يَرْكُضُ (*Sunan an-Nasā'ī* 4020) and "*Whoever leaves the Community or separates himself from it by the length of a span and dies, dies the death of ignorance (jāhiliyya)".* مَنْ خَرَجَ مِنَ الطَّاعَةِ وَفَارَقَ الْجَمَاعَةَ فَمَاتَ مَاتَ مِيتَةً جَاهِلِيَّةً (*Ṣaḥīḥ al-Bukhārī* 7054).

than useful. For instance, the available *mujtahidūn* are dispersed over cities and continents; there are no consistent yardsticks for who qualifies as a *mujtahid;* there is no guarantee that the *mujtahid* might not change his opinion before an *ijmā'* is formally reached due to the diversity of mental, cultural, ideological, circumstantial, geographical, and legal backgrounds.[328] The pace of developments on the social, political, economic, scientific, and medical fields are simply beyond the capacities of classically educated *mujtahidīn*.[329]

In attempting to resolve the conundrum, early modern reformers such as Muḥammad Iqbal[330] and Rashīd Riḍā[331] noted that it was wrong to assume that *ijmā'* was historically an affair of the *mujtahidīn* in Islamic societies, and that modern, democratic systems of government demanded that decisions on law should involve the *entire* community rather than a small and conservative clerical class. Their argument focused on the definition of the term *jamā'a* ('community') in the texts: was this the 'community of scholars', or the 'community of the Companions' or the 'community of Muslims' as a whole?[332] The conclusion they came to was that the whole Muslim community was to be the focus and that the process of legal consensus should be delegated to those in charge of the affairs of this whole community – that is the government and its legislative body, and not restricted to a group of legal scholars. The thinking of contemporary scholars is that government control over licensing and qualifications could add consistency and authority, and in this way the decisions of the elected legislative assembly could, therefore, constitute to all intents and purposes an *ijmā'*.[333]

Such views, however, still remain contentious. It is argued that any attempt to institutionalise *ijmā'* in some form of government legislature system is bound to alter the nature of *ijmā'*: those entrusted with the task, they argue, were never 'elected' but were recognised for their learning, and their conclusions were not subject to a 'majority vote'.

Nevertheless, the need for change has been recognised as pressing in order to close the parlous gap between the theory and practice of Sharī'a. In answering to his need, the task of the proponents of Sharī'a reform has been to make the case that Islamic Law is a flexible phenomenon that allows for earlier opinions to be revisited in the light of new knowledge, and that the objections raised to the incorporation of *ijmā'* into the national legislature process

> is based on the dubious assumption that an elected legislative assembly will not reflect the collective conscience of the community, and moreover goes against the Islamic spirit of *al-*

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[328] The problem is intensified whten it is understood that it is a condition of *ijmā'* that all the *mujtahidīn* be simultaneously in agreement.

[329] M. Amanullah, 'Possibility of conducting ijma` in the contemporary world', *Journal of Islamic Law Review*, 6. pp. 109-125.

[330] "The transfer of the power of *Ijtihad* from individual representatives of schools to a Muslim legislative assembly which, in view of the growth of opposing sects, is the only possible form *Ijma'* can take in modem times, will secure contributions to legal discussion from laymen who happen to possess a keen insight into affairs. In this way alone can we stir into activity the dormant spirit of life in our legal system, and give it an evolutionary outlook". Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam*, Stanford University Press and Iqbal Academy Pakistan 2012, p.138.

[331] "What is meant by the community is the 'people of binding and loosening' from every age ... This adjustment applies to the Nation, for the Nation represents 'the people of binding and loosening'. They are the ones who are entrusted with this and it is they – not the *mujtahidūn* – who are to have their opinions and programmes obeyed." والمراد بالجماعة أهل الحل والعقد من كل عصر ... أقول: إن التعديل للأمة، وإنما يمثل الأمة أهل الحل والعقد، وهم الذين يناط بهم أمرها ويجب عليها اتباعهم فيما أجمعوه وعزموه لا المجتهدون، R. Riḍā, *Tafsīr al-Qur'ān al-Ḥakīm* ('*Tafsīr al-Manār'*) Al-Manār Press, Cairo, 1328 AH, p.214.

[332] The last definition was actually the view of al-Shāfi'ī: "We accept the decision of the public because we have to obey their authority, and we know that whereever there are sunnas of the Prophet, the public cannot be ignorant of them, although it is possible that some are, and we know that the public can neiher agree on anything contrary to the sunna of the Prophet nor on an error." (*Shāfi'ī's Risāla* tr. M. Khadduri, p. 286). نقول بما قالوا به اتباعا لهم. ونَعلَمُ أنهم إذا كانت سُنَن رسول الله لا تَغزُبُ عن عامَّتِهِم وقد تَغْزُبُ عن بعضهم. ونعلم أن عامَّتَهم لا تجتمع على خلافٍ لِسُنَّة رسول الله ولا على خطأ (ed. A. M. Shākir, Dār al-Kutub al-'Ilmiyya, Beirut 1939, p. 472).

[333] 'Abd al-Wahhāb Khallāf, علم اصول الفقه, Maktabat al-Da'wā al-Islāmiyya, Shabāb al-Azhar, n.d. p.51: "(*Ijmā')* can be convened if it is taken over by Islamic governments of all kinds, so every government can set the conditions by which a person attains the level of *ijtihād*, and grant discretionary licence to conduct *ijtihād* to those who fulfill these conditions. Thus every government can know its *mujtahidīn* and their opinions on any matter, and if the government is in agreement with them, and the *mujtahidīn* themselves in all the Muslim states are in agreement with each other on this matter, this will constitute an *ijmā'."* ويمكن انعقاده إذا تولت أمره الحكومات الإسلامية على اختلافها، فكل حكومة تستطيع أن تعين الشروط التي بتوافرها يبلغ الشخص مرتبة الاجتهاد، وأن تمنح الإجازة الاجتهادية لمن توافرت فيه هذه الشروط، وبهذا تستطيع كل حكومة أن تعرف مجتهديها وآراءهم في أية واقعة، فإذا وقفت كل حكومة على آراء مجتهديها فى واقعة ,واتفقت اراء المجتهدين جميعهم في كل الحكومات الإسلامية على حكم واحد في هذه الواقعة، كان هذا إجماعا .

> *maṣlaḥa*, the common good and the basis of the theory of *ijmāʿ* which endows the community with the divine trust of having the capacity and competence to make the right decisions.[334]

The pressure for reform along these lines is growing. ʻAbd al-Ḥamīd al-Anṣārī the former head of the faculty of Sharīʿa and Law at the University of Qaṭar, recently argued that the principle of consensus in the modern era demands to be expanded,

> since it today is nothing but (the legitimate embodiment) of the rule of (the majority) in parliamentary voting on legal legislation issued by the legislative authority, a substitute for individual jurisprudence and old jurisprudential doctrines. This allows the legislator to choose the most appropriate jurisprudential opinions for the needs of our societies and the most in line with the spirit of the age and human rights charters, especially in the areas of: family rulings, women's rights, and the relationship with the other. This is entirely in accordance with what is meant by 'those in authority' in the Qur'ānic verse: *Obey Allah and obey the Messenger and those in authority from among you*.[335] Obedience to them means obedience from all members of society to the legislation promulgated, without reference to their legal *madhāhib*.[336] [xxv]

The operative definition of *ijmā'* for the modern environment is legislation as a collective *human* endeavour, with the implication that Muslims have the right to enact legislation suitable to societies as they are now. It is, and always has been, as the former Shaykh of al-Azhar Maḥmūd Shaltūt confirmed, simply the agreement of the majority at a specific place and time, not a universal directive.[337]

Authenticity and the challenge of archaism

One of the signal points of modernisation among Muslim scholars is the need to understand where historical, political and social contexts play a defining role. Dr. Aḥmad ʻIbādī, General Director of *Al-Rābiṭa al-Muḥammadiyya lil-'Ulamā',* explains the need for a more active focus on the 'context', if present-day *fiqh* is to be up to the task assigned for it:

> Whereas the internal context related to the internal structuring of the assembly of the Text is clear – in a general sense – from the Qur'ānic, jurisprudential heritage of the Muslims, the grasp of the external context is still in need of more research and study. [338] [xxvi]

Dr. ʻIbādī argues that this study is necessary, since the contemporary context

> is brimming with upheavals and new developments that call for a deep understanding and a conscious grasp, and require that one gets mastery of this context so that *ijtihād* will be up to the required level, particularly if we understand that these upheavals and developments are by their nature different from those which the Islamic view has 'handled' before now. [339] [xxvii]

The 'context' issue, and the relationship of lawmaking to prevailing social values, applies to the heritage in several ways. The importance for the theorist on Islamic law and the prospects for its activation in the contemporary environment, is how to distinguish universal elements, from culturally-specific parameters. Behnam Sadeghi identifies, typically, four constituents on the spectrum:

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[334] Kamali, *op cit*, *online text* pp.178-9.

[335] Qur'ān IV (al-Nisā'), 59. يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ

[336] 'Abd al-Ḥamīd al-Anṣārī, الإجماع في العصر الحديث (*'Ijmā'* in the modern era'), *Al-Ru'yā* (Oman), 30 Aug 2020.

[337] "*Ijmā'*, in reality, is nothing other than 'the agreement of the majority', sicne the *ijmā'āt* that have come down to us from the era of the Compajnoins was nothing other than 'the agreement of the majority' – that is, the agreement of the Companions who were present [at the time] and did not apply to those outside al-Madīna, for any mandate they undertook, or any *jihād* he participated in, or trade or enterprise he was engage in." أنَّ الإجماع في حقيقته، ماهو إلا (اتفاق الأكثرية) لأنَّ الإجماعات التي نقلت من عهد الصحابة ماهي إلا (اتفاق الأكثرية)، أي اتفاق الصحابة الحضور منهم، فلا يشمل من كان خارج المدينة، لولاية يتولاها، أو جهاد يشارك فيه، أو تجارة يسافر لها، أو عمل ينشغل به ('Abd al-Ḥamīd al-Anṣārī, *ibid*.)

[338] الإحياء Vol. 26, November 2007, p.45.

[339] *Ibid.*

(i) The textual canon, namely the Qur'ān and the binding ḥadīths

(ii) The techniques of interpreting the canon (such as abrogation, qualification, and analogy)

(iii) Previous legal decisions in the legal *madhhab*

(iv) The present social conditions, needs, and values of the law-making class.[340]

How the elements of this spectrum are prioritised determines the approach of the jurisprudent – between determinism and hermeneutic flexibility. As Sadeghi's study illustrates, one should be wary of assuming that the religious character of Islamic law, and the fact that Muslim legal traditions invoke sacred authority, has ever been a guarantor of legal independence from the subjective experience of the jurisprudent and the cultural patterns of the time in which he lived. The historical record indicates that it was the influence of social conditions prevailing during the lifetimes of the law-making class that was rationalised and harmonised through exegetic rationales with the texts, rather than *vice versa.*

The question that the educator can thus pose to the student is: *should sacred law be seen as operating in a fundamentally different way from secular law?* Moreover, if the heritage of Islamic law is conditioned by cultural context and historical circumstance, on what basis should one consider as sacrosanct the apportioning of rights and status under law in the Islamic heritage?

This question has direct relevance for the issue of legal archaisms and anachronisms which are controversially adduced by some as a badge of authenticity.[341] Muslim legal reformers are accordingly challenging the fundamentalists' claimed authentication via the letter of the texts, and the dilemma that the ensuing legal absurdities, particularly with respect to the *ḥudūd* penalties, present to the contemporary believer.

The strength of the orthodox case: the Texts

One of the main challenges from conservative thinkers opposed to change comes from the understanding that certain texts, known as 'definite texts' (*nuṣūṣ qaṭ'iyya al-dalāla*), are immutable and cannot be questioned. This understanding is principally founded upon the Qur'ānic text:

> He it is Who has revealed the Book to you; some of its verses are decisive, they are the basis of the Book, and others are allegorical; then as for those in whose hearts there is perversity they follow the part of it which is allegorical, seeking to mislead and seeking to give it (their own) interpretation. But none knows its interpretation except Allah.[342]

The dispute concerns the proportion of verses described in this passage as *muḥkamāt* ('decisive') and thus held as 'definite texts', and those that are *mutashābihāt* ('allegorical') and held to have allegorical or presumptive meaning (*nuṣūṣ ẓanniyyat al-dalāla).* That the texts concerned with ritual and worship – the *'ibādāt* – and the basics of belief in heaven and hell, reward and punishment, the forbidden and the permissible are 'definite texts' is undisputed.[343] The controversy is centred on whether, under the category of reward and punishment, the specifics of the *ḥudūd* penalties are included. If they are included, they cannot be questioned or amended, on the grounds that, according to the Qur'ān:

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[340] Behnam Sadeghi, *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition,* Cambridge University Press. 2013, p.164.

[341] Behnam Sadeghi's study focuses on how this influenced the development of Islamic law on the issue of the supposed invalidity of the prayers of men who pray adjacent to women, which depends not on a *ḥadīth,* as is claimed, by on the prevailing social habits.

[342] Qur'ān III (Āl 'Imrān), 7. هُوَ الَّذِي أَنْزَلَ عَلَيْكَ الْكِتَابَ مِنْهُ آيَاتٌ مُحْكَمَاتٌ هُنَّ أُمُّ الْكِتَابِ وَأُخَرُ مُتَشَابِهَاتٌ فَأَمَّا الَّذِينَ فِي قُلُوبِهِمْ زَيْغٌ فَيَتَّبِعُونَ مَا تَشَابَهَ مِنْهُ ابْتِغَاءَ الْفِتْنَةِ وَابْتِغَاءَ تَأْوِيلِهِ وَمَا يَعْلَمُ تَأْوِيلَهُ إِلَّا اللَّهُ

[343] These texts, according to Ibn Qayyim al-Jawziyya (and others): "do not alter from their single condition, neither according to times, places or the *ijtihād* of imāms: such are the requirement to carry out those things that are obligatory, and to forbid that that are prohibited, and the *ḥudūd* ordained by the Sharī'a concenring criminal acts and so on. This is unaffected by any alternation or *ijtihād* that goes against what was laid down." (Ibn Qayyim, إغاثة اللهفان من مصائد الشيطان Ed. M. H al-Faqqī, Dār al-Maʿrifa, Beirut 1395/1975, Vol I, pp.330-331). لا يتغير عن حالة واحدة هو عليها، لا بحسب الأزمنة ولا الأمكنة ولا اجتهاد الأئمة، كوجوب الواجبات، وتحريم المحرمات والحدود المقدرة بالشرع على الجرائم ونحو ذلك، فهذا لا يتطرق إليه تغيير ولا اجتهاد يخالف ما وضع عليه .

> It is not fitting for a Believer, man or woman, when a matter has been decided by Allah and His Messenger to have any option about their decision: if any one disobeys Allah and His Messenger, he is indeed on a clearly wrong Path.[344]

How do the reformers respond to this scripturally-focused argument? They take a number of paths, including:

- The importance of the historical context of the revealed verses and the *ḥadīth* references;
- The implications of *al-maṣāliḥ al-mursala* and the obligation to *ṣadd al-dharā'i'*;
- The precedent of their suppression, from the actions of the Prophet or the Companions;
- The 'symbolic' purpose of the punishments
- The *fiqh* principle of the *maqāṣid al-Sharī'a*
- The 'doubt principle'
- The position taken that, as a product of *ijtihād*, these *ḥudūd* penalities can equally be annulled by *ijtihād*.

The arguments adduced to address the dilemma of a scriptural text that is held to be 'valid for all times and all places' is encapsulated by the position taken by the Imam of the Bordeaux Mosque in France Shaykh Ṭāriq Oubrou, who argued that

> "Islam did not come up with *ḥudūd* that were not known to the Arabs, and the Prophet took into account the prevailing custom at the time. Times have changed as well as norms, and these must be considered in Sharī'a. The *ḥudūd* cannot be applied if this will lead Muslims to leave their religion; the Sharī'a cannot push people away from their creed." [345] xxviii

Also incorporated in this statement are the principles of *al-maṣlaḥa al-mursala* and its subdivision of *ṣadd al-dharā'i'* or 'blocking the means to evil' (see above unit *C2.2.6 - The debate on al-maṣlaḥa al-mursala and its implications*). This is the argument, for instance, illustrated by Ibn Qudāma when he noted how 'Umar ibn al-Khaṭṭāb ordered his governors to suspend the enforcement of all *ḥudūd* punishments during times of war for the purpose of preventing those people who had committed such crimes from deserting to the enemy's camp in order to escape punishment. [346] For the reformers the precedent of suppression of a *ḥadd* penalty due to extenuating circumstances, either by the Companions[347] or even by the Prophet himself,[348] is a major pillar of their argument in favour of leniency.

Moreover, the reformers insist, even if the medieval *ḥudūd* punishments such as amputation, flogging and crucifixion are indeed featured in the Qur'ān, these are accompanied by

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[344] Qur'ān XXXIII (*al-Aḥzāb*), 36. وَمَا كَانَ لِمُؤْمِنٍ وَلَا مُؤْمِنَةٍ إِذَا قَضَى اللَّهُ وَرَسُولُهُ أَمْرًا أَنْ يَكُونَ لَهُمُ الْخِيَرَةُ مِنْ أَمْرِهِمْ وَمَنْ يَعْصِ اللَّهَ وَرَسُولَهُ فَقَدْ ضَلَّ ضَلَالًا مُبِينًا . Other Qur'ānic passages cited are: Qur'ān III (*Āl 'Imrān*) *32 "Say: Obey Allah and the Messenger; but if they turn back, then surely Allah does not love the unbelievers"* قُلْ أَطِيعُوا اللَّهَ وَالرَّسُولَ فَإِنْ تَوَلَّوْا فَإِنَّ اللَّهَ لَا يُحِبُّ الْكَافِرِينَ ; Qur'ān III, 132 *"And obey Allah and the Messenger, that you may be shown mercy"* وَأَطِيعُوا اللَّهَ وَالرَّسُولَ لَعَلَّكُمْ تُرْحَمُونَ ; Qur'ān IV (*al-Nisā'*) 59*; "O you who believe! obey Allah and obey the Messenger and those in authority from among you"* يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ ; Qur'ān VIII (*al-Anfāl*) 20 *"O you who believe! obey Allah and His Messenger and do not turn back from Him while you hear"* يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَرَسُولَهُ وَلَا تَوَلَّوْا عَنْهُ وَأَنْتُمْ تَسْمَعُونَ ; Qur'ān XXXIII (*al-Aḥzāb*) 66 *"On the day when their faces shall be turned back into the fire, they shall say: O would that we had obeyed Allah and obeyed the Messenger! "* يَوْمَ تُقَلَّبُ وُجُوهُهُمْ فِي النَّارِ يَقُولُونَ يَا لَيْتَنَا أَطَعْنَا اللَّهَ وَأَطَعْنَا الرَّسُولَا .

[345] Basma Karāsha,هل الحدود الشرعية قابلة للتطبيق (*'Are the Islamic Hudood Punishments Implementable')* , BBC London, 5th December 2013, (accessed 31/03/2019)

[346] Ibn Qudāma, *Al-Mughnī* (1417/1997) Vol 13, p.173. Section 1278 لَا يُقَامُ الْحَدُّ عَلَى مُسْلِمٍ فِي أَرْضِ الْعَدُوِّ : "That the commander of an army or a company of Muslims should not order a man to be flogged while he is on a *ghazwa* ... lest the fervor of Satan catch up with him, and he joins the infidels." أَنْ لَا يَجْلِدَنَّ أَمِيرُ جَيْشٍ وَلَا سَرِيَّةٍ رَجُلًا مِنْ الْمُسْلِمِينَ حَدًّا ، وَهُوَ غَازٍ ... لِئَلَّا تَلْحَقَهُ حَمِيَّةُ الشَّيْطَانِ ، فَيَلْحَقَ بِالْكُفَّارِ .

[347] 'Umar ibn al-Khaṭṭab's suspension of the *ḥadd* for theft in a year of famine is another frequently-cited example.

[348] The classic example is *Ṣaḥīḥ al-Bukhārī,* 6823: "Narrated Anas bin Malik: 'While I was with the Prophet a man came and said, "O Allah's Messenger, I have committed a legally punishable sin; please inflict the legal punishment on me"… The Prophet said, "Haven't you prayed with us?" He said, "Yes." The Prophet said, "Allah has forgiven your sin / legally punishable sin"'. يَا رَسُولَ اللَّهِ إِنِّي أَصَبْتُ حَدًّا فَأَقِمْهُ عَلَيَّ ... قَالَ " أَلَيْسَ قَدْ صَلَّيْتَ مَعَنَا ". قَالَ نَعَمْ. قَالَ " فَإِنَّ اللَّهَ قَدْ غَفَرَ لَكَ ذَنْبَكَ ". أَوْ قَالَ " حَدَّكَ ".

exhortations towards justice and forgiveness.[349] A further argument is the *symbolic purpose* of these punishments, in that they were designed primarily to function as a deterrent, not as a punishment, and that this deterrence function will necessarily change according to the changing complexions of criminality over the ages.

Above all, the reformers refer to the *maqāṣid al-sharī'a,* the 'purposes behind the Law', as developed by Muslim thinkers – al-Shāṭibī prominent among them – between the 11th and 14th (5th and 8th AH) centuries.[350] Under this perception the harshness which they recognised in the *ḥudūd* punishments was to be tempered through recourse to the higher aims of the literal texts, and these necessarily licensed latitude in their application. This latitude was necessary not only due to changing contexts and circumstances, but also in response to a perception that their implementation might be contrary to a broader sense of justice.

The legal mechanism for this waiving was the *doubt principle*, the conscious deliberate use of ambiguity, and the elaborate methods used to get round potential injustice caused by the process of interpreting the will of the Divine Legislator. All the schools of law started from the principle that the *ḥudūd* should not be applied in cases where there is the least ambiguity.[351] Accordingly the *qāḍī's* function was to actively strive to prove that such ambiguities existed. The authority for this search for ambiguity was given as the *hadiths:* "Ward off the *ḥudūd* by means of ambiguities"[352] and "Avert the legal penalties from the Muslims as much as possible".[353] Muslim jurists thus obsessed over devising an 'economy of certainty', but as Intisar Rabb observes,

> "this appears "doubly perplexing in a religious legal tradition that posits God as a divine Lawgiver who asserts absolute supremacy over the law and who 'legislated' a series of harsh criminal sanctions …. If Islamic law is a textualist legal tradition requiring Muslims to apply the rule of God rather than the discretion of men (as Islamic theorists maintain that it is), how did doubt… come to be so central?"[354]

The ambiguity concerning the *ḥudūd* punishments, combined with the reticence to challenge the authority of the Divine Lawgiver, could at times lead to the subterfuge of highly creative avoidance techniques.[355]

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[349] The common cited text for this purpose is Qur'ān IV (*al-Nisā'*), 16: *"If they repent and improve, then let them be. Lo! Allah is ever relenting, Merciful.*" فَإِنْ تَابَا وَأَصْلَحَا فَأَعْرِضُوا عَنْهُمَا إِنَّ اللَّهَ كَانَ تَوَّابًا رَحِيمًا .

[350] Abū Iṣḥāq al-Shāṭibī (ob. 790/1388) in his الموافقات في أصول الشريعة ('Congruences in the Fundamentals of the Revealed Law'). The *maqāṣid* came to be listed as five in number: i) Preservation of Faith; (ii) Preservation of Life; (iii) Preservation of Wealth; (iv) Preservation of Intellect; (v) Preservation of the Family (Lineage). Later thinkers added a sixth *maqṣad*: Preservation of Dignity or Reputation, which related to issues such as false accusations of fornication or adultery. Contemporary thinkers use this category to delegitimise public floggings as a violation of this human dignity, a dignity that the Qur'ān maintains has been guaranteed by the creator, c.f: Qur'ān XVII (*al-Isrā'*) 70-71: *"And surely We have honored the children of Adam ... they shall not be dealt with a whit unjustly."* وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ ... وَلَا يُظْلَمُونَ فَتِيلًا .

[351] A common citation counselling against hasty application of Sharī'a ordinances is the Umayyad Caliph 'Umar ibn 'Abd al-ʿAzīz's response to a criticism of his hesitation: "Be not hasty, son; for God condemned the consumption of alcohol on two occasions in the Qur'ān, and prohibited it only on a third occasion. I fear that I shall present people with a truth based on one phrase, and they may defend themselves using another, and discord will thus ensue". لا تعجل يا بني؛ فإن الله قد ذمّ الخمر في القرآن مرتين, وحَرَّمها في الثالثة, وإني أخاف أن أحمل الحقّ على الناس جملةً, فيدفعوه جملةً, ويكون من هذا فتنة .

[352] دفع الحدود بالشبهات - recorded in the *Muṣannaf* of Ibn Abī Shayba, the *Musnad* of al-Ḥārithī, and the *Musnad* of Musaddad ibn Muṣarḥad. Alternatively: ادْرَأُوا الْحُدُودَ بِالشُّبُهَاتِ in *Bulūgh al-Marām*, Book 10, Ḥadīth 1221.

[353] *Jāmi' al-Tirmidhī,* 1424: "Avert the legal penalties from the Muslims as much as possible, if he has a way out then leave him to his way, for if the Imam makes a mistake in forgiving it would be better than making mistake in punishment." ادْرَءُوا الْحُدُودَ عَنِ الْمُسْلِمِينَ مَا اسْتَطَعْتُمْ فَإِنْ كَانَ لَهُ مَخْرَجٌ فَخَلُّوا سَبِيلَهُ فَإِنَّ الإِمَامَ أَنْ يُخْطِئَ فِي الْعَفْوِ خَيْرٌ مِنْ أَنْ يُخْطِئَ فِي الْعُقُوبَةِ

[354] Intisar A. Rabb, *Doubt in Islamic Law, A History of Legal Maxims, Interpretation, and Islamic Criminal Law*, Cambridge University Press, 2015, p.5). See also: Intisar A. Rabb, 'Islamic Legal Maxims as Substantive Canons of Construction: *Ḥudūd*-Avoidance in Cases of Doubt', *Islamic Law and Society* 17 (2010) pp.63-125.

[355] An example of this concerns the circumstances surrounding the punishment for unlawful pregnancy, as Sadakat Kadri illustrates: "Classical jurists … developed fantastic presumptions to minimise the possibility that the pregnancy of a single woman would be considered reason to stone her to death. Hanafites mitigated the risks by ruling that gestation could last for as long as two years … Shafiʿites then doubled that period, while Malikites estimated the maximum at five years, encouraged by their own founder's claim to have spent three years in the womb. The Hanbalites acknowledge that impregnation was no proof of consensual sex, meanwhile, by way of a particularly impressive fiction: the claim that Caliph Umar once acquitted an expectant mother when she told him that she was a 'heavy sleeper' who had undergone intercourse without realising it." (Sadakat Kadri, *Heaven on Earth: A Journey Through Shari'a Law*, VIntage Books, London, 2012, p.212).

Intisar Rabb also points to an interesting reverse dynamic taking place, whereby human adjudication becomes reverse-engineered into Prophetic authority, and thereafter textualised. The 'ward off the *ḥudūd'* maxim dates from the 2nd/8th century, but by the 4th/10th century it came to be attributed to the Prophet, leading to its scriptural enshrinement which endured.

> [T]his move was astonishing because it would seem wholly opposed to the values of Islamic textualism and divine legislative supremacy. It was also astonishing because the transformation of the canon from a judicial practice to a legal text was so effective that few later jurists were even aware of the dubious nature of the prophetic pedigree for the doubt canon.[356]

Once the maxim was conveyed as a *ḥadīth,* it not only assumed normative authority, it also represented a new, revised element of the divine intent that enabled jurists *not* to punish individuals who contravened the boundaries set down by God.[357]

The argument of contemporary reformers is that this pre-supposes a prioritisation of repentance, restorative justice and rehabilitation, and that this approach in essence mirrors modern criminal justice systems. Salah al-Ansari and Umar Hasan (*Punishment, Penalty, and Practice: Reinterpreting the Islamic Penal Code*) argue that despite the clear Qur'ānic authority for the *ḥudūd* penalties, their retention today makes no more sense than "insisting that Muslims wage war using horses since war-horses are mentioned in the Qur'an".[358] Their case is that, under the authorisation of the *maqāṣid al-sharī'a* hermeneutic

> if the text is in contradiction with the public interest, the public interest takes priority because the purpose of the text is to serve the public interest. What the public interest may be is variable and will change from time to time, from one place to another and will always depend on the cultural and societal context. [359]

As a corollary, that which constituted a crime and its proportionate punishment was something determined in classical Islamic law by people, not by the scriptural texts, since statistically these texts did not *specify* a punishment. The term for this category was *ta'zīr* ('discretionary punishment') and this, historically, was decided by the *qāḍī* or the state authority on a case by case basis.[360] The case for further separating criminal punishment from the directives of the scriptural texts is made by the argument that criminal law actually falls within the category of *mu'āmalāt,* 'interactions' on the social, economic and political levels. These interactions, unlike *'ibādāt* ('devotional acts of worship') such as prayer and fasting, can be rationalised.

The case for the reformers ultimately rests upon the argument that the details of the punishments were not provided by the scriptural texts but elaborated over history by the jurisprudents using hadith sources of varying validity. Should the *fuqahā',* they argue, have involved themselves with them as an issue of *tafsīr* in the first place, given that their efforts appear at one point or another to contradict the scriptures? Examples for this are the capital penalty for apostasy, where the Creator's instruction was that the reckoning for this was only to takes place in the Afterlife, and the fact that the set of the most severe *ḥudūd* ordinances do not coincide with *al-sab' al-mūbiqāt*, 'the seven ruinous sins' given in the ḥadith collections as *shirk*, sorcery, unjust homicide, usury, the impoverishment of the orphan, military cowardice and calumny against innocent women.[361] If *ijtihād* created the *ḥudūd* penalites such as the stoning to death of married adulterers, the flogging

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[356] Intisar Rabb, "Reasonable Doubt in Islamic law," *The Yale Journal of International Law* 40:1 (2015), p.70.

[357] Sohaira Siddiqui, *op. cit.*, p.180.

[358] Salah al-Ansari and Umar Hasan, *Punishment, Penalty, and Practice: Reinterpreting the Islamic Penal Code (Hudood)*, The Quilliam Foundation, United Kingdom, 2020, p.5.

[359] Salah al-Ansari and Umar Hasan, *op. cit*, p.5.

[360] Strictly speaking, the *ta'zīr* category was for actions considered 'sinful', which undermine the Muslim community, or which threaten public order, but stand outside the category of *ḥudūd* or crimes deserving of retaliation (*qiṣaṣ*). Even in the case of retaliation, a 'prescribed' compensatory killing for a murder, the Qur'ānic stipulation كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلَى *"Retaliation is prescribed for you in the matter of the murdered"* (Qur'ān II (*al-Baqara*) 178) the prescription was not held to be binding as, for instance, the 'presciption' to fast.

[361] See, for instance, *Ṣaḥīḥ al-Bukhārī* 6857.

with 80 lashes for drinking alcohol and the death penalty for apostasy, *ijtihād* can equally remove them, without fear of divine displeasure, given the 'two rewards – one reward' guarantee for their endeavours, whether or not they prove correct in them.[362]

The 'pragmatism' argument of the reformers

Having outlined the doctrinal discussion on the *ḥudūd* ordinances the educator can introduce what may be the core position of the reformers, the practicality of enforcing these ordinances in the contemporary world environment.

This argument typically focuses on the levels of economic and social injustice, and the problems of political corruption in much of the contemporary Muslim world. The case the reformers make is that these conditions place the application of the *ḥudūd* into the category of doubt, and that this argues for the applicability of *al-maṣāliḥ al-mursala* and the obligation towards *ṣadd al-dharā'i'* mentioned above. Making this very point, former Grand Muftī of Egypt Ali Gomaa described the contemporary age as providing too many areas of doubt,

> in that it may be characterised an age of *ḍarūra* ('overriding necessity'), an age of *shubha* ('doubt'), an age of *fitna* ('turmoil'), an age of ignorance – all of which must impact upon Islamic legal rulings.[xxix]

He also noted that the doubt and impracticality issues have existed for a millennium, during which time,

> there have been no *ḥudūd* penalties in a country like Egypt due to the absence of the legal conditions stipulated for the specific methods for establishing proof, and these same conditions that stipulated the possibility of retracting a confession.[xxx]

There were therefore realities to consider, he continued,

> for one cannot live yesterday today, or today tomorrow, for a number of reasons: there are communications and new technologies that are turning our world into a single village, the ever increasing population levels … the number of sciences that have emerged to aid our understanding of man's nature, both with respect to himself and as part of the human community.[363] [xxxi]

The argument that ours is an age of ignorance may not impress the orthodox thinkers, who will perceive the current *jāhiliyya* as all the more reason to repeat the formula for the corrective. Nevertheless, the case these voices of reform make is that the absence of those historical conditions that first called forth the *ḥudūd* ordinances can only make their implementation now a cause for harm.

For the reformers this rationale carries greater weight than the authenticity rationale of the orthodox thinkers. While the existence of the *ḥudūd* ordinances in the Qur'ānic text means that they are an essential feature of the Sharī'a, argues Prof. Jasser Auda, "but for them to become law, that is a different story –

> – you cannot put something in the law unless you can make sure that the law will achieve justice… Balancing the different parts of the Sharī'ah or freezing these parts of the Sharī'ah from the law until we make sure that the conditions in which these parts apply are there. Otherwise we do not apply them. We freeze them. We wait".[364]

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[362] See *Ṣaḥīḥ al-Bukhārī* 7352, *Sunan Abī Dāwūd* 3567 and *Sunan an-Nasā'ī* 5381: *"If an adjudicator passes judgment and strives to reach the right conclusion and gets it right, he will have two rewards; if he strives to reach the right conclusion but gets it wrong, he will still have one reward."* إذا اجتهد الحاكم فأصاب فله أجران، وإذا اجتهد فأخطأ فله أجر

[363] Ali Gomaa, عقوبات الحدود.. بين التعليق والتطبيق (*'Ḥudūd punishments … Between Suspension and Application'*), Islam Online, August 2011.

[364] Jasser Auda, *Sharī'ah, Ethical Goals and The Modern Society*, Muis Academy, The Occasional Paper Series, No.10, 2015, p20. Dr. Auda is the executive chairman of the London-based Maqasid Institute, a founder member of the International Union of Muslim Scholars, a member of the European Council for Fatwa and Research, and a member of the Fiqh Council of North America.

In making this case, scholars have also applied the argument of the 'symbolic' role of the *ḥudūd* based on the *maqāṣid al-sharī'a* standpoint. This is not without its critics, however. Firstly, the 'symbolic' value of deterrence is fundmentally weak: contemporary criminological research downplays the effectiveness of prioritising deterrence over against rehabilitation.[365] Secondly, the rationale adopted for the suspension of the *ḥudūd* penalties, pending the necessity for certain conditions and procedures to be available that are not in evidence today, has an inherent weak point. The problem with this position, as Salah al-Ansari and Umar Hasan underline, is that

> this means that if the conditions and procedures are fulfilled, there would be no obstacle to putting the *hudood* into practice once again … [Such arguments] are not very different from the past authorities in that they reassert the same notion that these penalties are only deterrents and are difficult to apply because of the burden of proof which the *fiqh* made almost impossible to achieve. But this does not reassure us at all because in case the offender confessed to his crime, for instance, the application of the *hudood* penalty becomes unavoidable according to this view.[366]

The prestige of Islam

A second line of the 'pragmatism' argument focuses on the harm issue, but in this case the harm is to Islam itself. Insisting on the implementation of the *ḥudūd* penalties, reformers argue, risks reputational damage for the faith, by presenting it as a belief-system inadequate for the needs of contemporary Muslims living in societies that are now far removed from the brutalities of earlier eras. They argue that the *ḥudūd* principles more broadly depend on a societal background that embraces issues that are no longer relevant, such as slavery, and therefore cannot fully fit in with the reality of twenty-first century life.[367] In this case and others of this kind, the reformers maintain, the desire to avoid reputational damage is entirely justified as an argument: it is no modern pre-occupation, but itself has Prophetic authentification, from Muḥammad's refraining from imposing a capital punishment in order to protect his reputation and to prevent anyone from saying that Islam is a violent religion.[368]

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[365] The former Chief Justice of Malaysia, Tun Abdul Hamid Mohamad argues that Muslim countries which have implemented Islamic capital punishments, or *ḥudūd*, have not been successful in reducing crime rate and that those countries that practice *ḥudūd* laws were far behind in terms of tackling crime and establishing peace and justice. See, M. Gabriel, An Attempt to reform *Hudud* Ordinances – online publication.

[366] Salah al-Ansari and Umar Hasan, *op. cit*, p.23.

[367] The question of slavery and its abolition is an illustration of the ambiguity and the difficult terrain that the reformers have to negotiate. The slave trade in the Muslim world was banned under pressure from the non-Muslim world for the first time in 1847 for the region of the Persian Gulf, and in 1887 the authorities of the Ottoman Empire signed with Great Britain a convention against it. The last Muslim countries to outlaw slavery were Qatar (1952), Saudi Arabia (1962), and Mauritania (1980). As with the moratorium on *ḥudūd* penalties, the issue of slavery is not permanently resolved, since Islamic *fiqh* cannot formally abolish an explicitly condoned practice in the Qur'ān or even declare it as 'obsolete'. This was indicated, for example, by Shaykh Ṣāliḥ al-Fawzān in his *fatwā* in August 2015 that declared: "Islam did not prohibit the taking of women as slaves, and whoever calls for the prohibition of slavery is ignorant and an atheist. For this ruling is tied to the Qur'ān and cannot be repealed as long as the *jihād* in the cause of God continues … This is God's ruling, which does not pander or defer to anyone. Moreover, if slavery were to be abolished, Islam would have declared so unambiguously, as it did with usury and adultery. For Islam is forthright and does not seek to pander to people" إن الإسلام لم يحرم سبي النساء ومن ينادي بتحريم السبي هو جاهل وملحد، إن هذا الحكم مرتبط بالقرآن ولا يمكن إلغاؤه طالما استمر الجهاد في سبيل الله ... ذلك حكم الله، لا محاباة ولا مجاملة لأحد ولو كان الرق باطلاً لكان الإسلام قد صرح بذلك كما فعل في الربا والزنا، فالإسلام شجاع ولا يجامل الناس . Hence, the notion of slavery still exists in principle. The conundrum is well illustrated by Muhammad Shahrur's attempts to square the circle on this: "If we insist on saying that the phrase 'what their right hands possess' refers to slaves we risk having to admit that this part of the *Book* is today no longer relevant. This, however, would contradict the axiomatic truth that Muḥammad's message is eternally valid for all times. Therefore, we propose to regard the so-called *misyār* marriages [temporary marriages without legal commitment to financial support or the right to a home, supported by Ḥanafī law], which have become quite popular in recent years, as the contemporary equivalent to the premodern master–slave girl relationship. We suggest that today's partners of a *misyār* marriage can be described by the phrase 'what their right hands possess'". (A. Christmann (ed and tr.): *The Qur'an, Morality and Critical Reason, The Essential Muhammad Shahrur,* Brill, Leiden, Boston 2009, p.316). The implication of Shahrur's statement is that the Qur'ān is rescued from irrelevance by the continued existence of forms of slavery.

[368] The ḥadīth referenced for this is *Ṣaḥīḥ al-Bukhārī* 3518: *'Umar said, "O Allah's Prophet! Shall we not kill this evil person (i.e. `Abdullah bin Ubai bin Salul)?" The Prophet) said, "(No), lest the people should say that Muḥammad used to kill his companions."* "فَقَالَ عُمَرُ أَلاَ نَقْتُلُ يَا رَسُولَ اللَّهِ هَذَا الْخَبِيثَ لِعَبْدِ اللَّهِ. فَقَالَ النَّبِيُّ صلى الله عليه وسلم " لاَ يَتَحَدَّثُ النَّاسُ أَنَّهُ كَانَ يَقْتُلُ أَصْحَابَهُ

Al-maṣāliḥ al-mursala as the future of Islamic law

For all the above reasons, were legislation confined to the values which the divine Lawgiver has expressly decreed, the Sharīʿa would prove incapable of meeting the needs of contemporary Muslims and the interests – *maṣāliḥ* - of the community. Contemporary thinkers are thus looking to *al-maṣāliḥ al-mursala* as a way out of the dilemma of continuity and change – finding an Islamic pedigree for flexibility and adaptability – even to the point of cancelling out practices that have hitherto been enshrined as part and parcel of the heritage. As authority for the practice the reformers reference the classical discussions on *al-maṣāliḥ al-mursala* as providing the template for radical reconsideration of the meaning and legal valency of the Texts (on this see unit *C2.2.6 - The debate on al-maṣlaḥa al-mursala and its implications*). "It seems to me that the Law is more probably based upon a*l-maṣāliḥ al-mursala",* argues ʿAbd al-Wahhāb Khallāf:

> "since if this door is not left open, Islamic legislation would remain frozen and cease to keep pace with changing times and environments. Whoever maintains that every detail of a person's interests, in any time or any environment, has been catered for by the Lawgiver and legislated through His *nuṣūṣ* and general principles, is not supported by facts on the ground." [369] [xxxii]

The question is how much this argumentation can hold water against the position taken by orthodox thinkers on the modern context: that *jāhiliyya* is *jāhiliyya*, and the principles outlined in the Sharīʿa cannot be dismissed on the grounds of the prevailing reality and practices of contemporary Muslims.

An illustrative test of this is the question of *ribā* ('usury') in the case of Muslims taking a mortgage on a house. The argument of the reformers is that some scholars have issued *fatwās* licensing the taking of mortgages. These were made on the basis of the license granted by the Ḥanafī school that allowed Muslims to participate in transactions that may be prohibited under Islam, but allowed by the law of non-Muslim countries, provided that there was a real interest for the Muslim in such transactions.

Their legal argumentation concerns those matters that serve the interests of the Muslim. As detailed earlier, these are a) the five 'necessaries' or 'essentials' (*ḍarūriyyāt*) of religion, life, intellect, lineage and property b) 'supplementary needs' (*ḥājiyyāt*) for avoiding hardship and c) 'embellishments' (*taḥsīniyyāt*) or improvements, both moral and material. Those scholars licensing the taking of a mortgage adopt the principle that 'supplementary needs' can attain to the status of 'necessaries.' If ownership of a house is classed merely as a supplementary need it can nevertheless become a necessity, in that people may not always have sufficient income to pay rent for their accommodation. Moreover, as they grow old, they may not be able to work and have an income. If they do not have a house of their own, they may run into great difficulty. Orthodox-minded scholars dismiss this argument as an unlawful concession to the *jāhiliyya*.[370]

[369] ʿAbd al-Wahhāb Khallāf, علم اصول الفقه, Maktabat al-Daʿwā al-Islāmiyya, Shabāb al-Azhar, n.d. p.88.

[370] See, for instance, Yūsuf al-Qaraḍāwī, في فقه الاقليات المسلمة ('*On the Jurispridence of Muslim Minorities'*) Dār al-Shurūq, Cairo 1422/2001, pp. 154 ff.

➢ *DISCUSSION POINT – The suspension of the ḥudūd – principle, pragmatism or prestige?*

In reviewing the above, the educator can engage the students with a discussion on whether the arguments put forward by the reformers will be sufficient to make the case against the forces of legal conservatism. The reformers appear to concentrate on three angles of approach:

i. the fundamentally *un-Islamic character* of the penalities;

ii. the *impracticality* of the penalities in the present age;

iii. the implications for the *international reputation* of Islam.

The 'un-Islamic character of the penalities':

The educator can evaluate with the students the strength of the reformers' case that *ḥudūd* punishments lack unambiguous scriptural support. For instance, the case that stoning for adultery is un-Islamic is made on the grounds that it is not mentioned in the Qur'an but only in weak *ḥadīth*. But is this type of example undermined by comparable punishments such as crucifixion being indeed mentioned in the Qur'ānic text?

- How can the conservative argument – that the moratorium is thus founded upon inconsistencies – be countered?

In addition, the reformers make the case that the application of the *ḥudūd* penalties is inconsistent with the religious/legal heritage.

- How strong is this case based on their appeals to the following? –

  - the *contextual* argument – that in featuring punishments such as amputation, flogging and crucifixion the Qur'ān was merely perpetuating the Arabian practices of the environment of the Revelation?

  - the *symbolic* purpose of the penalties – as intended for deterrence but not, pragmatically, for implementation?

  - the principle of *doubt* (*shubha*) – as embracing also the 'doubt' that social, political and economic injustices and corruption can be considered as falling under this category?

The 'impracticality of the penalities' in the present age:

The reformer scholars make the argument that maintaining the application of the *ḥudūd* is not a practical possibility, and cannot be made due to the conditions of the present age that are unsuitable to their equitable functioning. A number of questions follow on from this:

- Is this argument, and the call for a moratorium on their application, essentially a means to avoid discussing the principle of the matter?

- Is the claim that Islamic jurisprudence supports the evolution, modification and repeal of *ḥudūd* laws in practice a secondary, superficial rationalisation?

- If the suppression of the *ḥudūd* is made purely on a pragmatic basis on the grounds of the unsuitability of the present age and social environment, could they not easily be re-enforced at any such time when it is deemed that the age and social environment has once again become suitable?

- Can this 'impracticality' argument be used *against* those who seek to prevent their implementation precisely due to perceptions – held by some – concerning the corruption and the *jāhiliyya* of the present age?

The implications for the 'international reputation of Islam':

Since orthodox Muslim thinkers argue for the importance of scriptural, legal and cultural integrity, reformers are having to make the case that the reforms they are calling for are not the product of alien influences or a response to pressures external to Islam. The educator can usefully engage with the students a discussion on a number of questions relating to this issue of doctrinal and cultural loyalty:

- Is the reformers' case concerning 'impracticality' in reality dependent on non-scriptural, non-heritage arguments?
- Is the final argumentation, rather, drawn from the overriding reality of the modern ethical, juridical and political environment that considers the *ḥudūd* ordinances:
  - at odds with modern conceptions of addressing criminality?
  - at odds with what constitutes the purpose of deterrence, punishment and rehabilitation? [371]
  - a violation of the modern sense of human dignity?
  - at risk of characterising Muslim civilisation as barbaric, medieval and backward?
- How will the proponents of reform counter the objection of the orthodox thinkers that by taking the above issues as a yardstick they are implying embarrassment at the ethical starting points of Islam, compared to the starting points of international human rights?

The dilemma: can separate ethical perceptions on law reconcile?

In view of the objections of the conservative thinkers concerning doctrinal and cultural identity, reformers perceive that significant change concering the *ḥudūd* is – in the short term – unlikely to be considered in those countries that currently practice them. They therefore argue that it would be more helpful to reconcile Islamic criminal law with international human rights by *reforming* the *ḥudūd* punishments rather than simply calling for their *abolition*. The educator can here raise with the students some important related issues:

- How will the reformation of the *ḥudūd* penalities, as opposed to their abolition, be reconciled with the intellectual and ethical infrastructure of international human rights?
- Do current calls for a suspension (i.e. a moratorium) undermine this reconciliation?
- When calling to align the *ḥudūd* with international human rights, are contemporary Muslims scholars actually arguing in practice not for their reform or suspension, but their abolition?
- By aligning the *ḥudūd* with contemporary human rights, does this award the centre of gravity for reform to starting points alien to the Islamic moral and ethical universe? Does this therefore constitute a repudiation, by Muslims, of the Islamic heritage?
- How can the proponents of reform make the case that aligning/suspending/abolishing the *ḥudūd* and denying their Qur'ānically stated purpose as 'God's deterrence' (*nakālan min Allāh*)[372] does not equate to weakening the Sharī'a or subordinating it to un-Islamic starting points?
- How can the argument be made that this reform process is preserving the core Qur'ānic values, and not instead rendering them anachronistic, even if the reformers are focusing closely and conscientiously on the meaning and interpretation of the *muḥkamāt* verses?
- How can reformers make the case that Islamic identity and authenticity are preserved in an endeavour that seeks to reconcile some core features of Islamic law with a contemporary reality that, ultimately, does not appear to be set by the parameters of Islamic thought?

[371] Worldwide, theories and approaches dealing with punishment and its purposes have changed significantly over the centuries. While orthodox-minded Muslims see deterrence as the main purpose of punishment, ordained by God as a form of discipline and meant to be harsh and publicly humiliating, the western world emphasises that its purpose is the rehabilitation of the criminal.

[372] Qur'ān V (*al-Mā'ida*) 38: As for the thief, both male and female, cut off their hands. It is the reward of their own deeds, an exemplary punishment from Allah. Allah is Mighty, Wise. وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جَزَاءً بِمَا كَسَبَا نَكَالًا مِنَ اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ

C3.3.3 – Islamic law in the contemporary global environment

Having established the historical ambiguities on the *ḥudūd* penalties, and the objections of the contemporary reformers, the educator can here engage the students in a useful discussion on the deeper implications of these arguments for the role of a religious law in the contemporary world.

What are the primary consequences, for instance, of attempting to apply Islamic law on the political level? Contemporary reformers note that, historically, the record has not been successful, for much the same reasons as applying the anachronism of the *ḥudūd* penalties. "You cannot really bring Sharīʿa to politics based on historical precedents of Islamic politics" argues Prof. Jasser Auda,

> "you cannot really bring something that happened during the various historical Islamic Caliphates or even during the time of the four rightly guided Caliphs, and impose it onto our context without understanding the current politics of the state … to borrow something from our history and bring it to a nation-state, where citizens are supposed to be equal and you have borders and sovereignty, this is a different world that you are bringing the history to.

The fundamental error of the Islamists, he maintains, is that their focus has been on the "form and structure of Sharīʿa in history, rather than its abstract values that transcend time and space." The result has been an exhibition of absurdity:

> Some people do not observe the difference between Fiqh and *Qānūn* …. they wanted everything in our Fiqh, everything in my prayers, zakāh, hajj, and so on, to become codified in the legal system. In the post-Egyptian revolution some people even went far enough as to suggest setting up independent full-fledged ministries - Ministry of Prayers, Ministry of Zakāh and Ministry of Haj…How do you run a whole state, based on rituals? [373]

The problem, as Muhammad Shahrur underlined, was the confusion caused in the minds of latter-day Islamist thinkers by the historical period of the Companions being set as the template for Islam in all its dimensions. "We should remind our political and religious élite", he warns,

> that the governance of Muhammad's companions was purely based on a realpolitik which any state, ancient or modern, would be able to pursue (i.e., regardless of any prophetical message). The Arabs were by no means original in anything they did (politically) in the seventh century. Even their concept of a caliphate was completely improvised and based on the companions' need to fill the political vacuum left by the Prophet's death. [374]

Muhammad Shahrur argues that the period of the Rightly-guided Caliphs was in fact a transition period between the era of the Prophet and the era of Arab imperialism (of the Umayyads and Abbasids). Everything that happened in that transition period was based on the political requirements of the day. Their decisions were human, fallible, and conditioned by circumstances, and had no real connection with the Prophet.

Conservative forces throughout history have nevertheless failed to grasp this reality and have considered any deviation from what they conceived of as the classical experience to be a form of heresy. This uncritical reading of history, and the endeavour to implement this reading, has had its inevitable effect on political stability wherever it has been attempted.

In proposing a political model based ostensibly on an 'Islamic template', Islamist thinkers have invariably repeated this position by following a recurring pattern of ideological/theological rigidity, followed by a weakening of this rigidity when confronted with reality. In attempting to work out an Islamist corrective 'Abdul Ḥamīd Abū Sulaymān noted this recurrent shortcoming, and warned that

[373] Jasser Auda, *Sharīʿah, Ethical Goals and The Modern Society*, Muis Academy, The Occasional Paper Series, No.10, 2015, pp.14-15

[374] A. Christmann (ed and tr.): *The Qur'an, Morality and Critical Reason, The Essential Muhammad Shahrur*, Brill, Leiden, Boston 2009, p.336.

> the Islamization of policies within the nations of the Muslim world must not be allowed to come to a halt at the point of implementing the historical Islamic systems and those stipulated in the works of the early jurists. Instead, these should proceed in pursuance of higher Islamic objectives and purposes, while adhering to the basic principles and values of Islam.[375]

The educator can explore with the students the question of how far this conflation of religion with politics in a contemporary state can, or should, be engaged with and how productive such an endeavour will likely turn out to be. (The question of 'an Islamic polity' with all its implications in the context of global modernity is a rich field of discussion, which the educator can address more fully in a later section of the Curriculum – the *[F] Courses - Globalism and the contemporary Muslim state*).

Non-Muslims under a law designed for Muslims

In considering the conflation of religion with the politics of a state, the educator can address the issue of the demographic realities of modern nation states, not only globally but also in the Muslim world. Political developments over the past two centuries – the weakening of the imperial model of Islamic polity in particular – presented Sharī'a thinkers with a new calculation: the issue of pluralism – that is the pluralism of conscience in the developing modern nation states, which was founded upon the principle of equality in the legal status of the individual.

The defining feature of Sharī'a law is that it is a religious law, and as such Islamic legal thought assigned itself a primary task: the building and securing of a just society, one that answers to the principles of the Revelation and the example granted by the Prophet. In the elaboration of the law the rights accorded the individual are the privilege of persons with full legal capacity: that is individuals of mature age, free, and of Muslim faith.

The focus of the jurisprudence is thus necessarily on Muslims, and over history the question of justice for the non-Muslim in the Muslim state was resolved through the *dhimma* ('protected community') legislation. Under this system, as 'people with a Revelation' (*ahl al-kitāb*),[376] Jews and Christians were liable to specific legal obligations such as taxes that differed from those imposed on Muslims (ostensibly in lieu of military service) and, in practice, subject to many restrictions vis-à-vis their interactions with Muslims. Beyond these issues of interaction the tendency was to grant communal and legal autonomy to these *ahl al-kitāb*, including the right to collect taxes for their own communal institutions, and administer law in personal and family affairs.

The relative autonomy of the non-Muslim communities, which proponents of the *dhimma* system argue for its historical efficiency and justice must, of course, be weighed against the issue of the gradation of rights. Since under the traditional conception the Muslim state was theoretically theocratic, the *dhimma* communities stood outside the believers' community and could not be accorded access to legal protection on an equal footing. In effect the position of the *dhimmī* communities was akin to the status of resident aliens enjoying rights of permanent residence in the Muslim state. In marked contrast to modern concepts of nationality and citizenship the classical conception of the state was one of a plural or multi-national state under the aegis of a dominant community.

The politicisation of the dhimma doctrine

Whilst the traditional concept implied, in theory, a balance of protection in exchange for exclusion from political participation, the unresolved issue of the political status of the *dhimmī*

[375] 'Abdul Ḥamīd Abū Sulaymān, *Towards an Islamic theory of International Relations, New Directions for Methodology and Thought*, The International Institute of Islamic Thought, Herndon Virginia, 1993, p.158.

[376] The term *ahl al-kitāb* (from Qur'ānic verses such as III [*Āl 'Imrān*], 64 and XXIX [*al-'Ankabūt*], 46) originally referred to Jews, Christians, and Sabaeans as possessors of books previously revealed by God. The term is also at times applied to Zoroastrians, Magians, and Samaritans. The people of the Book are regarded as 'unbelievers' because they do not accept the Prophet but they are not unbelievers in the sense of 'deniers of Allah'. Those communities that are not *ahl al-kitāb* have no rights, except where they may be accorded temporary *Amān* ('safety, protection, safe conduct') for political expediency.

communities in the modern context of nation states has bred tensions. Since Islamic doctrine insisted they do so, the various *dhimmī* communities came to think of themselves as fundamentally separate entities, symbolized by the possession of their own internal laws. There was thus coexistence, often comparatively successful, but one where mutual suspicion in the end prevented the emergence of a common identity.[377]

The educator can illustrate the tensions this internal 'Balkanisation' raised with the example of the 19th century reforms in the Ottoman Empire. As the empire's military and political power declined, imperialist European states claimed that the treatment afforded their own citizens under Sharī'a law in the Ottoman system was unacceptable. They thus wrested concessions from the Ottomans in the 1856 Imperial Reform Edict (*İslâhat Fermânı*) to accord their own citizens an extraterritorial status and all Ottoman subjects equality in education, government appointments, and administration of justice, regardless of creed. The Ottoman powers saw this as a means to win over the disaffected parts of the empire, especially in the Ottoman controlled and largely Christian parts of Europe. Tensions there had arisen as Christian communities in the empire saw in the developing nationalist and secular movements an opportunity to raise their status to a position of legal and political equality.

Muslims, on the other hand, viewed these changes not only as undermining the sovereignty of Muslim states, but as attempts to sabotage Muslim society. As the dominant-subordinate relationship between Muslims and *dhimmī* communities came to be overturned, many Muslims interpreted the concepts of rights and equality that accompanied these reform edicts not as matters of principle but as a subversive heresy forced on them by Christendom in order to weaken Islam.[378] And for Islamists in the present day, the concept of international human rights law and legal parity and status for non-Muslims still retain an association with European imperialism.

The deeper function of the dhimma principle

The educator can here engage the students in a discussion on whether the *dhimma* principle is essentially flawed and whether, despite the pragmatic motivation for its institution, its application and understanding has been productive for community relations. Scholars trace the origin of the *dhimma* doctrine, ultimately, to the Qur'ānic text in *sūra* IX (*al-Tawba*) 29 where the non-believers among the *ahl a-kitāb* are to be fought *"until they pay the tribute readily, being brought low*." [xxxiii]

Beyond the theory of protection in exchange for exclusion from political participation, the *dhimma* system as applied in practise by the jurisprudents focused on the state of subjection implied in the Qur'ānic verse. Under its influence, the purpose of reaffirming dominance did not limit itself to the juridical field, but accommodated what appear to be deeply-set psychological motivations to humiliate the non-believer. The commentator Ibn Kathīr reveals this urge to emphasise disgrace and humiliation in his exegesis on the Qur'ānic verse in question:

> Allah said: *"until they pay the jizya"* – if they do not choose to embrace Islam; *"with willing submission"* – in defeat and subservience; *"and feel themselves subdued"* – disgraced, humiliated and belittled. Muslims therefore are not allowed to honour the people of *dhimma* or elevate them above Muslims, for they are miserable, disgraced, and humiliated. [The *ḥadīth* collector] Muslim recorded from Abū Hurayra that the Prophet said: "Do not initiate the *salām* greeting to the Jews and the Christians, and if you meet them in a road, force them to its narrowest alley." This is why the Leader of the Faithful 'Umar ibn Al-Khaṭṭāb, may Allah be pleased with him, demanded his

[377] On the success of the *dhimma* system historically, scholarly opinion is divided. Proponents view it has having provided uniformly and indefinitely a status of benevolent tolerance. But as Bat Ye'or has argued, the origins of this perception "go back to the nineteenth century when it served as the basis for arguments of an apologetic propaganda in favor of the maintenance of the Ottoman Empire in order to protect its Christian provinces from Russian and Austrian designs. The dogma of Islamic tolerance and the *rayas'* happiness became the cornerstone of both European policy and its balance of power. The ethnic aspect of the *dhimmi* peoples was denied and scorned because it might be used to justify national claims manipulated by foreign imperialism." (Bat Ye'or, *The Decline of Eastern Christiantiy under Islam, from Jihad to Dhimmitude*, Associated Universtity Presses, New Jersey, 2010, p.248).

[378] Bat Ye'or, *Op. cit.*, p.171.

> well-known conditions be met by the Christians, conditions that ensured their continued humiliation, degradation, and disgrace. [xxxiv]

Despite the fact that the Qur'ānic verse dates from a period when the first Muslim community was numerically weak and endangered, and therefore does not reflect later stages of Muslim relations with non-believers such as saw pacts with the Christians of Najrān and the Jews of Madīna, Muslim thinkers proved unable to progress beyond the inaugural moment.[379] As a result, the mistrust was institutionalised juridically and the *dhimma* principle failed to develop specific guarantees for minority rights, or specific penalties for the violation of these rights. Over history, reflecting attitudes inculcated in the Muslim masses over centuries of Islamic dominance, it became overtly discriminatory and took on the formal expression of legalized persecution.[380]

The educator can discuss with the students the relevance of Islamist calls today for the restoration of the *dhimma* system in the light of the scholarly centre of gravity on this issue, which is predominantly negative. The rejection of the progressive scholars is based on the argument that a) the *dhimma* doctrine is merely a practice governed by historical conditions and prejudices and is not Islamically essential; and b) that the contemporary state already has tax regimes that are independent of the Sharī'a stipulations, so that adding a further level of taxation for specific members of the citizenry is discriminatory and unjustifiable.[381]

The conundrum of gradated rights in the Sharī'a that privilege Muslims over others has exercised the minds of reformers. The weighting of rights, for instance, has the potential to derail state legislation on many fronts, and as Saʿd al-Dīn al-Hilālī professor of law at al-Azhar University observes, the religiously specific nature of the Sharī'a in administering the *ḥudūd* can even sabotage the exercise of criminal law,

> since *ḥudūd* rulings by the consenses of the *fuqahā'* are cancelled in cases of 'doubt' (*shubha*) … with some of them claiming that they are cancelled on the accused's repentance … This has caused the Egyptian administration to resort to *Qānūn* law in order to ensure the safety, stability and cohesion of society, as the *Qānūn* law includes deterrent penalties that cannot be overriden due to *shubha* or repentance.[382] [xxxv]

A legal loophole such as this, one that is unavailable to the non-believer, highlights the task of reconciling the legal heritage of a system devised for Muslims with the reality of religious pluralism in the modern state.

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[379] The lasting effect of the transformation is illustrated by the *fatwā* issued in 1788 by the Shāfi'ī Shaykh Ḥasan al-Kafrāwī in Cairo "[Christians and Jews] should not be allowed to clothe themselves in costly fabrics which have been cut in the modes which are forbidden to them … they should not be permitted to employ mounts like the Muslims … they should not be permitted to take Muslims into their service … they shall only walk single-file, and in narrow lanes they must withdraw even more into the most cramped part of the road … The absence of every mark of consideration toward them is obligatory for us; we ought never to give them the place of honor in an assembly when a Muslim is present … If [their houses] are of the same height, or higher, it is incumbent upon us to pull them down to a size a little less than the houses of the true believers … They are forbidden to build new churches, chapels, or monasteries … Their men and women are ordered to wear garments different from those of the Muslims in order to be distinguished from them."

[380] The Egyptian writer Samīr Ḥabashī records an interesting example of the humiliation preoccupation in a mid-19th century certification for a burial: "The burial of the deceased is commanded for the abhorrent in belief and infidel,and son of an infidel *Ḥannā Ibn Ya'qūb*... Insofar as the aforementioned has died and collapsed, and in order to bring his unclean corpse to the ground so that it would not be a cause of corruption of the air… after due request for the mercifulness of the Shari'a, and after the extraction of the obligatory *kharāj* tax for this, we have granted authorization for the corpse's burial in your dunghill that leads on the road to Hell, as apportioned according to your infidel creed, and we confirm that there is no obstacle [to this burial] on the part of the Noble Shari'a. Authorisation granted on 16 *Jumādā al-Awwal* 1261 AH [May 22, 1845]. *Signed*: Muḥammad Jamāl al-Dīn, Servant of the Noble Shari'a". شهادة دفن الميت - أمر بدفن ميت إلى المكروه فى العقيدة والكافر إبن الكافر : حنا إبن يعقوب ... من حيث أن المذكور قد هلك وفطس ولأجل إدخال جثته النجسة إلى الأرض حتى لا تكون سببا فى فساد الهواء .. فقد صار الإسترحام من جانب الشرع الشريف ، وبعد أخذ الخراج اللازم عليها صرحنا بدفنها ضمن مزبلتكم الآيلة إلى طريق جهنم والمخصصة حسب مذهبكم الكافر وحتى لا يصير مانع من جانب الشرع الشريف فقد صرح بهذه الرخصة فى ١٦جمادى الأول سنة ١٢٦١ هجرية. إمضاء : محمد جمال الدين خادم الشرع الشريف.

[381] Cf. the observations by Jasser Auda: "What about non-Muslims? It's suggested that they pay *jizyah*. But that's unacceptable because now you have a state that has been in existence for a long time and where its citizens are equal. Nowadays, you want some members of the state to pay a tax, while others do not. That is unacceptable … today, Muslims are not paying anything to the state in that sense [of the zakāh]. Everybody pays taxes, but you want to add a tax just because the person is not a Muslim?" (Jasser Auda, *Sharīʿah, Ethical Goals and The Modern Society*, Muis Academy, The Occasional Paper Series, No.10, 2015, pp.14-16).

[382] Newspaper article تعرف على حقيقة حديث الدكتور سعد الدين الهلالى حول الحدود *Al-Yawm al-Sābi',* November 18th 2017.

Scholars are proposing various solutions to this conundrum. Prof. Jasser Auda makes the case that there are parts of the Sharīʿa that are specifically addressed to Muslims, particularly in matters of worship. Other than that, the Sharīʿa addresses the shared human dimension:

> So perhaps the best way is to keep the part of the Sharīʿah that is specific to Muslims to ourselves and align with people in the society on common concerns and common issues, not just Islamic issues. [383]

By these 'common concerns and common issues' Prof. Auda means those which stand beyond *fiqh* and its *thawābit* ('fixed') matters that are *qaṭʿī* (permanent and non-negotiable), and which go to the philosophy of the law, that is the arena covered by *maqāṣid al-sharīʿa* – its purposes, ends and meanings.[384] Discussions such as these are ongoing and have yet to be fully theorised and achieve the authority to be prescriptive.

Meanwhile, pragmatically, in the amalgams that have emerged to date in Muslim states, historical realities and considerations have weighted the balance in favour of *Qānūn* legislations. Progressively-minded Sharīʿa scholars have preferred to demonstrate the *de facto* compatibility of these legislations with the Islamic jurisprudential heritage. In areas of tension such as the *ḥudūd* penalty system, reformers have echoed Professor al-Hilālī's concerns for legal consistency by proposing that all criminal offences should be treated outside that system, on the grounds of its earlier circumvention under category of *taʿzīr* ('discretionary punishment', see above p.81). The proposal is tempered by concerns of political manipulation, but the appeal to written parliamentary legislation as is presently practiced is validated as a method to limit and render cohesive the use of *taʿzīr* powers.[385] As such, the implication is that its administration is rightly the responsibility of the state and no longer reserved to Muslim jurists.

There remains, however, the reality of conflicting jurisdictions in the various amalgams that have emerged in Muslim states, where dual court systems have developed in parallel. In an environment where believers and non-believers, under globalising expectations, will demand full and ungradated access to legal recourse, how can the Muslim state combine the principles of Sharīʿa and Civil Law adjudicated in their respective courts?

Mohammed Kamali in his recent investigation of the problem argues that the two court systems should be combined in order to preserve the perception of justice as monolithic. This would require "mixed benches of shariah and civil law judges in order to solve the perennial conflict of jurisdiction between them". Such a debate, however, may remain theoretical since it must contend with the reality on the ground of the legal structures of the contemporary state. "'Legal pluralism' can no doubt exist", observes Wael Hallaq,

> but only with the approval of the state and its law … If the way to the law is through the state, then Islamic law can never be restored, reenacted or refashioned (by Islamists or ulama of any type or brand) without the agency of the state. [386]

Complicating this resolution are the pressures exerted by Islamist thinkers, for whom the issue is bound up with the identity and essence of the type of Muslim state they seek to achieve. Their shorthand for this identity is skilfully presented to the public in the form of *ḥudūd* penalties,[387]

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[383] Jasser Auda, *Sharīʿah, Ethical Goals and The Modern Society*, Muis Academy, The Occasional Paper Series, No.10, 2015, pp.21-22.

[384] Jasser Auda, *Op. cit.*, p.17.

[385] On this, see M. Kamali, *Crime and Punishment In Islamic Law, A Fresh Interpretation*, Oxford University Press, 2019, p.193.

[386] Wael Hallaq, *An Introduction to Islamic Law*, Cambridge University Press, Cambridge, New York, 2009, p.169.

[387] "Should there be different options over a matter, the ruler, judge, and mufti are advised to opt for the most appropriate yet lighter options that may be available, especially in the imposition of penalties….. It is not surprising therefore why shariah is often associated with punitiveness. Punishment in itself has never been a shariah priority and purpose. Yet common perceptions persist that the most intricate and difficult is the most pious— as it takes more effort and self- sacrifice! Legal pedantry thus manages to repress the softer voices of Islam." (M. Kamali, *Op. cit., p*p.345-6.

but the fundamental tensions are far wider and go deep to the heart of the debate on Islamic law and the secular state.

➢ *DISCUSSION POINT – Islamic law and the secular state*

A number of questions are thrown up by the above modules in *Course C3*: *The Clash and the Amalgam; The Shock of the New; and The Challenges of a Religious Law in the Contemporary Environment.* The educator can here engage wth students in broad-brush discussions on the role of the Sharī'a in the modern nation-state. A primary question to resolve is:

- What is the role and future of Islamic law given that it is being posited for nations which are now increasingly multi-cultural?

In exploring this question, the basic arena for debate focuses on the meaning, purpose and legitimacy of secularism in the Islamic context. Conservative thinkers adopt an antagonistic attitude to the secularism issue, but the following questions may challenge that opposition:

- Given that the Qur'ān does not prescribe in particular the form of government, is the antagonism to secularism justified on the basis of the primary scripture or the early Muslim communities?
- Is the secular state consistent with the inherent nature of Sharī'a and the history of Muslim societies?
- Does the history of Islam provide enough evidence to reject the separation of the Islamic legal institutions from the mechanisms of the state?
- When advocates call, or deplore, 'separation' are they talking about the same thing? Is it separation from politics or public life, or separation from the mechanisms of the state?
- Is the idea of an Islamic state one that is based on European ideas of state and law, and not one founded on Sharī'a or the Islamic tradition?

In talking of living according to the Sharī'a there are differing conceptions of what this means. For some it refers to living in a state run according to Islamic legal principles. For others it means living one's personal life according to Islamic principles as implied in the *maqāṣid al-sharī'a.*That is, Sharī'a as conceived as an Islamic normative system for the behaviour of the individual, not as a method for imposing its principles by state power.

- Does coercive enforcement of Shari'a by the state betray the Qur'ān's insistence on voluntary acceptance of Islam?
- Is Sharī'a achieved more effectively by external regulation, or by voluntary adherence?
- Does voluntary adherence imply the removal of the sanctity status of the Sharī'a?
- Should the Sharī'a enjoy a status of sanctity, if it is a product of human endeavour?
- Does the denial of its sanctity status and delegitimisation of external enforcement necessarily lead to its relativisation and strip it of the certainty value of truth?
- Would the removal of a temporal deterrent facilitate un-Islamic behaviour and reduce compliance of Muslims to the principles and obligations promoted by the Sharī'a?

'Secularism' as a term has developed a loaded significance, with Islamists in particular associating it with antagonism to religious faith.

- Is this understanding of the term 'secularism' accurate? How would one define secularism, as to its purposes – 'religious neutrality' or 'religious neutralisation'?
- Would 'pluralism' be a better term?

Proponents of secularisation in the Muslim world, such as Abdullahi Ahmed An-Naim (*Islam and the Secular State, Negotiating the Future of Shari'ah)*,[388] maintain that the roles of political secularism and religious faith are not merely separate, but complementary. They argue that a secular state does not require Islam to be separated from politics or public life, but instead separated from the state, so as not to allow for its manipulation. Moreover, it requires religion to provide a widely accepted source of moral guidance and norms to the political community, while religious faith needs secularism to mediate relationships between different communities (whether religious, anti-religious, or non-religious). The symbiotic relationship, an-Naim argues, depends on the separation of their respective terrains, and just as Sharī'a should be independent of the control of the state and immune from its 'fugitive politics',[389] the state should be secure from the misuse of religious authority. Its policies or legislation should accordingly be based on civic reasons accessible to citizens of *all* religions and none.

This position poses a number of questions:

- Is the secular state the only framework available to negotiate ethical differences between citizens (without seeking to resolve those differences)?
- Is the secular state, backed by institutionalised commitments to human rights and constitutionalism, the only system equipped to deal with competing claims to rights?
- Does Islamic law fundamentally "undermine the ethos of constitutionalism, human rights, and citizenship" as an-Naim claims? [390]
- Are the Islamic ideals of social justice, peace, goodness and virtue for a society achievable through the realization of civil discourse and political life in a secular society?

An-Naim argues that to live according to Sharī'a *requires* a secular state, on the grounds that freedom of conscience and choice – both on a personal level and in society with other Muslims – is the only valid and legitimate way of living a Muslim life, and that this can only be provided by a system that is not invested in enforcing a particular religious world view. Moreover, he argues, without a secular state that allows freedom of religion and expression, there is no possibility of *religious* development for Islam or any other religious doctrine.

- Is the claim that a secular state facilitates genuine pious belief – whereas a so-called 'Islamic state' leads to religious hypocrisy (*nifāq*) – a valid claim?
- Is the secular state's toleration of disbelief, and no belief, a barrier to Islam or, as al-Naim argues, a logical pre-requisite for sincere Muslim belief, in that faith has no value if it is forced?
- Can it be cogently argued that, rather than an 'Islamic state', it is thus the *secular* state that is necessary for the preservation and development of religious faith?
- Does living according to Sharī'a therefore *require* the existence of a secular state?

Finally, the educator can explore with the student what the role and form of the Sharī'a should be, going forward. The principal issue for the contemporary environment is the question of the function of a religious law and its implications in a pluralist environment:

- Given that the legal system in all its manifestations across the globe is seen as part of a social contract with a defined citizenry, can Islamic law as a religious law fit into that social contract?
- Can the gradation of rights implied in Islamic law be compatible with contemporary expectation of the rights of the individual, and command proactive allegiance, as opposed to coerced acquiescence?

[388] Abdullahi Ahmed An-Naim, *Islam and the Secular State, Negotiating the Future of Shari'ah*, Cambridge, MA: Harvard University Press, 2010.

[389] *Op. cit.*, p.275.

[390] *Op. cit.*, p.283.

- What is the purpose, today, of a legal system that includes within its dominion not only the defense of public order and the rights of the person and property but also the defense of 'the rights of God'? Is this appropriate for populations that have widely divergent views on metaphysics?

If the function and positive role for Sharī'a is to be preserved in an environment that is far removed from the classical context of Islamic jurisprudence, the approach and methodology will necessarily require deep re-configuration. If this is accepted:

- How does one counter the Islamist objection that by adapting the Sharī'a to the contemporary environment the process is in essence setting the hierarchy of privilege in favour of contemporary nation-state values and structures – constitutionalism, human rights, and citizenship – as if these were universal and non-negotiable?
- Does the 'Islamic secularism' model that reformers such as an-Naim propose constitute the only effective discourse for promoting the role of Islam in public life? [391]
- If the reconfiguration of Sharīʿa is intended to produce a good society for all citizens in the contemporary state, is it not axiomatic that this endeavour will need to be achieved by including non-Muslims in the discussion?
- But if, by rejecting the truth of Islam, non-believers are considered to place themselves in a lower grade of moral arbitration, are non-Muslims permitted to make a contribution to the discussion? And what might this contribution be, if permitted?

As Wael Hallaq highlights, the debate on the Sharī'a has to date been based on false premises. The past two centuries of cultural clash has seen the Sharī'a "transformed from a worldly institution and culture to a textuality", a body of texts that is entirely stripped of its social and sociological context so that

> the surviving residue of the Shariʿa, its entexted form, functions in such uniquely modern ways that this very residue is rendered foreign, in substance and function, to any of its historical antecedents...The Shariʿa has become a marker of modern identity, engulfed by notions of culture and politics but, ironically, much less by law. [392]

Reduced to a textual logosphere, traditionalist proponents have historically been resistant to change the classical model of Sharī'a through fear of contamination. More creative thinkers have sought to remove this resistance by expanding the concepts of *'urf* and *istiṣḥāb* to accommodate the accumulated the experience and legislatory practices of non-Muslims on the grounds that they are the common product of the *fiṭra* of Mankind.[393] By so doing, they are developing the potential for new vistas of jurisprudential thought to open up without severing with the heritage.

On the basis of views such as this, the educator can present the students with a starting point for emancipating the debate on Islamic law from anachronistic models and preoccupations with 'authenticity' or with 'protecting' the faith from modernity. These discussions are essentially sterile and unproductive.

In its place, the educator can promote a live, transformative discussion that will enrich and enlighten the student of Islamic law and train a new generation of forward-looking thinkers, who will be able to self-confidently embrace the task of integrating the *maqāṣid* of the legal heritage into the globalising consensus on international standards of law, in a spirit of equity and *istiḥsān*, towards the ultimate goal of a good society for all citizens.

[391] *Op. cit.*, pp.292-293.

[392] Wael Hallaq, *An Introduction to Islamic Law*, Cambridge University Press, Cambridge, New York, 2009, pp.167 and 170.

[393] See above unit *C2.2.7 - Further legal mechanisms beyond scripture*.

[C] Courses - Revisiting the legal heritage

Course C1		The historical cradle of *fiqh*	
	Module		Units
		Preparatory discussion	The value of historical analysis of the developing corpus of *fiqh* *Sharī'a* and *Fiqh* - Clarification of definitions
	C1.1	**Historical overview of the development of law**	C1.1.1 The Qur'ān and the Prophet
			C1.1.2 Early development and *ad hoc* jurisprudential synthesis
			C1.1.3 The Umayyad period and the challenges of empire
			C1.1.4 Resistance and rebellion – proto-Shī'ism and proto-Sunnism
			C1.1.5 The Abbasid period and institutional groundings
			C1.1.6 Al-Shāfi'ī and the contours of *uṣūl al-fiqh*
	C1.2	**The evaluation of the legal source material**	C1.2.1 Classical *ḥadīth* collection and validation
			C1.2.2 Historical and contemporary critique on the *isnād* system
			C1.2.3 A renewed approach to *ḥadīth* verification - *isnād cum matn* analysis

Course C2		The legal method	
	Module		Units
	C2.1	**The *uṣūl al-fiqh***	C2.1.1 Defining the roots of Law
			C2.1.2 Between the obligatory and the prohibited (*al-aḥkām al-khamsa*)
			C2.1.3 The scriptural source: Lexical matters
			C2.1.4 The scriptural status of the Sunna
	C2.2	**The *uṣūl al-fiqh* methodologies**	C2.2.1 *Ta'āruḍ al-adilla* - The resolution of contradictions
			C2.2.2 Precedent and *ijtihād*
			C2.2.3 The categorisation of authority beyond scripture: *Ijmā'*
			C2.2.4 The categorisation of authority beyond scripture: *Qiyās*
			C2.2.5 The categorisation of authority beyond scripture: *equitable reasoning*
			C2.2.6 The debate on *al-maṣlaḥa al-mursala* and its implications
			C2.2.7 Further legal mechanisms beyond scripture: *'urf* and *istiṣḥāb*
			C2.2.8 The *ḥukm shar'ī* (Law or value of Sharī'a)
	C2.3	**The limitations of the classical legal model**	C2.3.1 The narrowing of the ijtihad endeavour
			C2.3.2 On the 'closure of *ijtihād*'
			C2.3.3 The *de facto* sidelining of Islamic law

Course C3		The contemporary legal arena	
	Module		Units
	C3.1	**The clash and the amalgam**	C3.1.1 The developmental gap – the merging of Islamic with European law
			C3.1.2 *Qānūn* as the default process of contemporary law
			C3.1.3 The mechanisms of Islamic Law and Common and Civil Law
	C3.2	**The shock of the new: reactionary scholarship**	C3.2.1 The search for a 'pre-colonial' template
			C3.2.2 The challenge to the *madhhab* system
			C3.2.3 Authenticity and the Salafists
			C3.2.4 The Islamist detour
	C3.3	**The challenges of a religious law in the contemporary environment**	C3.3.1 The Islamic jurisprudent in the contemporary Muslim state
			C3.3.2 Islamic law in the contemporary Muslim state
			C3.3.3 Islamic law in the contemporary global environment

BIBLIOGRAPHY

(Qur'ānic and Ḥadīth references, which are *passim*, are given in the footnotes)

'Ajlān, Fahd al-: مع نظرية المصلحة عند نجم الدين الطوفي ('On Najm al-Dīn al-Ṭūfī's Theory of al-Maṣlaḥa'), *Ṣayd al-Fawā'id*, September 2011.

Abdul Jalil, M, Mohammed Kamil, N, Khalilur Rahman, M: 'The greatest good for the greatest number of people: an Islamic philosophical analysis', *Journal of Social Sciences and Humanities*, Universiti Kabangsaan Malaysia, Vol. 9, No. 2 (2014).

Abū Sulaymān, 'Abdul Ḥamīd: *Towards an Islamic theory of International Relations, New Directions for Methodology and Thought*, The International Institute of Islamic Thought, Herndon Virginia, 1993.

Abū Sunna, Aḥmad Fahmī: العرف والعادة في رأي الفقهاء Al-Azhar, Cairo 1947.

Abū Zahra, M: أصول الفقه Dār al-Fikr al-'Arabī, 1377/1958.

Afghānī, S. al-: ملخص إبطال القياس والرأي والإستحسان والتقليد والتعليل University of Damascus Press, Damascus 1960.

Ahmed, R: *Islamic Law and Theology*, in Emon, A and Ahmed, R(edd), *The Oxford Handbook of Islamic Law*, Oxford University Press, 2018.

Ahmed, R: *Narratives of Islamic Legal Theory*, Oxford Islamic Legal Studies, OUP, 2012.

Ahmed, R: *Which Comes First, the Maqāṣid or the Sharīʿah?* in Nassery, I, Ahmed, A and Tatari, M (eds.), *The Objectives of Islamic Law: The Promises and the Challenges of the Maqāṣid al-Sharī'a,* Lexington, 2018.

Albānī, Muḥammad al-: حجة بنفسه في العقيدة والأحكام - الحديث (Riyadh, Maktabat al-Maʿārif, 1425/2005

Ali Gomaa, عقوبات الحدود.. بين التعليق والتطبيق (*'Ḥudūd punishments ... Between Suspension and Application'*), Islam Online, August 2011.

Alkhuli, M: *The Need for Islam*, on *Islamway* on August 21st 2008.

al-Tamāwī, S: السلطات الثلاث في الدساتير العربية المعاصرة وفي الفكر السياسي الإسلامي : تكوينها واختصاصاتها والعلاقة بينها Dār al-Fikr al-ʿArabī, 1996.

Amanullah, M: 'Possibility of conducting ijma` in the contemporary world', *Journal of Islamic Law Review*, 6. pp. 109-125.

Amman Message, http://ammanmessage.com/

An-Naim, Abdullahi Ahmed: *Islam and the Secular State, Negotiating the Future of Shari'ah*, Cambridge, MA: Harvard University Press, 2010.

Anṣārī, 'Abd al-Ḥamīd al-: الإجماع في العصر الحديث (*'Ijmā'* in the modern era'), *Al-Ru'yā* (Oman), 30 Aug 2020.

Ansari, S al- and Hasan, U: *Punishment, Penalty, and Practice: Reinterpreting the Islamic Penal Code (Hudood),* The Quilliam Foundation, United Kingdom, 2020.

Arkoun, M: *The Unthought in Contemporary Islamic Thought*, Saqi Books, London 2002.

Auda, J: *Sharīʿah, Ethical Goals and The Modern Society*, Muis Academy, The Occasional Paper Series, No.10, 2015.

Austin, J *Lectures on Jurisprudence, or, the Philosophy of Law* (J Murray, year 1895).

Bājī, Imām Abū al-Walīd al-: *Iḥkām al-Fuṣūl ilā `Ilm al-Uṣūl*, ed. A. Turki (Beirut, 1986/1407).

Bat Ye'or, *The Decline of Eastern Christiantiy under Islam, from Jihad to Dhimmitude*, Associated Universtity Presses, New Jersey, 2010.

Bencheikh, S: *We Need Dearabization of Islam*, Islamlib, 2006.

Bentham, J: *An Introduction to the Principles of Morals and Legislation*. Batoche Books.

Bouṭī, Saʿīd Ramaḍān al-: اللامذهبية أخطر بدعة تهدد الشريعة الإسلامية , Dār al-Fārābī, Damascus, 1426/2005.

Brown, J: 'How We Know Early Ḥadīth Critics Did Matn Criticism and Why It's So Hard to Find', *Islamic Law and Society* 15 (2008).

Burton, J: *The Sources of Islamic Law, Islamic Theories of Abrogation*, Edinburgh University Press 1990.

Christmann, A(ed and tr.): *The Qur'an, Morality and Critical Reason, The Essential Muhammad Shahrur,* Brill, Leiden, Boston 2009.

Coulson, N: *Conflicts and tensions in Islamic jurisprudence*. University of Chicago Press, 1969.

Crone, P: *Roman, Provincial and Islamic Law*, Cambridge University Press, 1987.

Daher, A: 'The Shari'a: Roman Law Wearing an Islamic Veil?' in *Hirundo*: *The McGill Journal of Classical Studies*, Volume III: 2005, pp.91-108.

Emon A, and Ahmed R (edd): *The Oxford Handbook of Islamic Law*, Oxford University Press, 2018.

Fernandes, L: 'Between Qadis and Muftis: To Whom Does the Mamluk Sultan Listen?' *Mamluk Studies Review* 6 (2002).

Gabriel, G: An Attempt to reform *Hudud* Ordinances – online publication. https://www.academia.edu/es/40113161/An_Attempt_to_reform_Hudud_Ordinances

Ghani, Abdullah Abdul and Adam, M. Zainol Abidin: *Business Ethics*, Malaysia: Oxford University Press 2011.

Ghazālī, Abū Ḥāmid al-: المستصفى من علم الأصول (Beirut: Dār Iḥyā' al-Turāth al-ʿArabī , n.d.),Vols. 1 and 2.

Goldziher I and Schacht, J: '*Fiḳh*', in Lewis, B, Pellat, C and Schacht, J (eds.), *The Encyclopaedia of Islam, New Edition, Volume 2: C-G* (Leiden, The Netherlands: Koninklijke Brill N. V., 1965).

Goldziher, I: *Introduction to Islamic Theology and Law*, Princeton University Press, New Jersey 1981.

Goldziher, I: *Muslim Studies (Muhammedanische Studien),* tr. C. Barber and S. Stern, Aldine, Atherton, Vol. II, 1971.

Goldziher, I: تاريخ التطور العقدي والتشريعي في الدين الإسلامي 2nd Ed. Dār al-Kutub al-Hadītha, Cairo, Baghdad.

Ḥabashī, Samīr: عقد بيع أملاك الكافر إبن الكافر والهالك إبن الهالك, *Muntadayāt al-Kanīsa*, January 2013.

Ḥalabī, 'Alī Ḥasan al-: فقه الواقع بين النظرية والتطبيق, دراسات في السياسة الشرعية *'The Jurisiprudence of Contemporary Affairs between Theory and Application' – Studies in Islamically Legitimate Politics, III*, Ramallah, 2nd Edition, 1420 AH

Hallaq, W: 'Was the Gate of Ijtihad Closed?' *International Journal of Middle East Studies*, Vol. 16, No. 1 (Mar., 1984).

Hallaq, W: *Sharī'a – Theory, Practice, Transformations*, Cambridge University Press 2009.

Hallaq, W: *An Introduction to Islamic Law.* Cambridge University Press, 2009.

Ḥammād, A: *Abū Ḥāmid al-Ghazālī's juristic doctrine in al-Mustaṣfā min 'Ilm al-Uṣūl, Vol. I*, Dissertation thesis, University of Chicago, March 1987.

Hilālī Saʿd al-Dīn al-: in newspaper artrticle (anon.) تعرف على حقيقة حديث الدكتور سعد الدين الهلالى حول الحدود *Al-Yawm al-Sābi',* November 18th 2017.

'Ibādī, A: الإحياء Vol. 26, November 2007.

Ibn 'Uthaymīn, الأصول من علم الأصول , Dār Ibn al-Jawzī, 1426 AH.

Ibn al-Jawzī, Abū al-Faraj: كتاب الموضوعات , Al-Madina 1386/1966.

Ibn al-Jawzī, Abū al-Faraj: مناقب الإمام احمد ابن حنبل , (ed. M.A. al-Khānjī), Al-Saʿada Press, Cairo.

Ibn Bāz: مجموع الفتاوى ومقالات متنوعة, Riyadh: Dār al-Qāsim 1420, Vol III.

Ibn Ḥazm: الإحكام في أصول الأحكام (ed. A. M Shākir), Vol. 8, Beirut 1403/1983.

Ibn Ḥazm: المحلى بالآثار (ed. A. M. Shākir, Al-Munīriyya, Cairo, n.d.) vol. 11.

Ibn Qayyim al-Jawziyya: إعلام الموقعين عن رب العالمين Ed. M. 'Abd al-Ḥamīd, Cairo 1373/1955, Vols. 1 & 4.

Ibn Qayyim al-Jawziyya: الطرق الحكمية في السياسة الشرعية Ed. N. al-Ḥamad, Dār ʻĀlam al-Fawāʼid, Majmaʿ al-Fiqh al-Islāmī, Jeddah, Vol. 1.

Ibn Qudāma, المغني (1417/1997) Vol 13. Dār ʻĀlam al-Kutub, Riyādh, 3rd. ed. 1417/1997.

Ibn Qutayba, Abū Muḥammad : تأويل مختلف الحديث , 2nd ed., Al-Ishrāq, 1419/1999.

Ibn Rajab: الرد على من اتبع غير المذاهب الأربعة, Al-Murabbī, 1437/2016.

Ibn Rushd: المقدمات الممهدات (Ed. M Ḥujjī), Beirut 1408/1988.

Ibn Rushd: فصل المقال فيما بين الحكمة والشريعة من الاتصال Dār al-Mashriq, 2nd ed., 1968.

Ibn Taymiyya: اقتضاء الصراط المستقيم لمخالفة أصحاب الجحيم, *Minbar al-Tawḥīd wal-Jihād,* 1994.

Ibn Taymiyya: درء تعارض العقل والنقل (*'Averting the Conflict between Reason and Tradition'*) Ed. M.R. Sālim, 1411/1991.

Ibn Taymiyya: مجموع الفتاوى Vol.8. Dār al-Ḥaramayn al-Sharīfayn, Madīna 1425/2004.

Iqbal, M: *The Reconstruction of Religious Thought in Islam,* Ed. M. Sheikh, Stanford University Press, California, and Iqbal Academy Pakistan, 2012.

Juynboll, G: *Muslim Tradition, Studies in chronology, provenance and authorship of early ḥadīth,* Cambridge Studies in Islamic Civilization, Cambridge University Press, 1983.

Kadri, S: *Heaven on Earth: A Journey Through Shari'a Law*, VIntage Books, London, 2012.

Kalbānī, ʻĀdil al-, MBC TV interview (Dubai) 22nd January 2016. https://www.youtube.com/watch?v=GWORE6OBfhc

Kamali, M: *Principles of Islamic Jurisprudence*, The Islamic Texts Society, Cambridge 2005.

Karāsha, B: هل الحدود الشرعية قابلة للتطبيق؟ (*'Are the Islamic Hudood Punishments Implementable')* , BBC London, 5th December 2013.

Kāsānī, Abū Bakr ibn Masʿūd al-: *The Unprecedented Analytical Arrangement of Islamic Laws*, trans. Imran A. K. Nyazee (Islamabad: Advanced Legal Studies Institute, 2007.

Kassab, S: اضواء حول قضية الاجتهاد فى الشريعة الإسلامية Dār al-Tawfīq al-Namūdhajiyya, 1404/1984.

Kevin Jaques, R: *Authority, Conflict, and the Transmission of Diversity in Medieval Islamic Law*, Brill 2006.

Khallāf, ʿAbd al-Wahhāb: علم اصول الفقه, Maktabat al-Daʿwā al-Islāmiyya, Shabāb al-Azhar, n.d.

Khan, I: *Authentication of Hadith: Redefining the Criteria*, International Institute of Islamic Thought, 2012.

Khujandī, Muḥammad Sulṭān al-Maʿṣūmī al-: هل المسلم ملزم بإتباع مذهب معين من المذاهب الأربعة (*Is a Muslim Obliged to Follow a Specific One of the Four Madhhabs?*, (first published in 1949), 2nd ed. 1420/1999.

Lamond, G: 'Analogical Reasoning in the Common Law', *Oxford Journal of Legal Studies*, Volume 34, Issue 3, Autumn 2014, Pages 567–588.

Lecomte, G: *Le Traite des divergences du hadith d'Ibn Qutayba*, Études arabes, médiévales et modernes, Publications de l'Institut français du Proche-Orient, Institut français de Damas, 1962.

Lewis, B, Pellat, C and Schacht, J (eds.), *The Encyclopaedia of Islam, New Edition, Volume 2: C-G* (Leiden, The Netherlands: Koninklijke Brill N. V., 1965).

Libson, G: 'The Relationship between Jewish and Islamic Law', *Encyclopaedia Judaica.*

Mahāwāt, ʻAbd al-Qādir: تجديد أصول الفقه عند الدكتور حسن الترابي , Sāmī Publications, Algiers 2020.

Maḥmaṣānī, S: فلسفة التشريع في الإسلام, Beirut 1365/1946.

Makdisi, G: "Classical Islam and the Christian West," in *Religion and Culture in Medieval Islam*, eds. Hovannisian and Sabagh (Cambridge: Cambridge University Press, 1999.

Mallat, C: "From Islamic to Middle Eastern Law, a Restatement of the Field," *The American Journal of Comparative Law*, Vol. 51 (2003).

Marghinānī, Burhān al-Dīn al-: الهداية في شرح بداية المبتدئ, ed. N. A Aḥmad, Idārat al-Qur'ān wal-ʿUlūm al-Islāmiyya, Karachi. Tr. Imran Ahsan Khan Nyazee, Amal Press, Also. tr. C Hamilton, *The Hedaya, Commentary on the Islamic Laws*, AhleSunnah Library, n.d.

Masud, M:*"Classical" Islamic Legal Theory as Ideology: Nasr Abu Zayd's Study of al-Shāfiʿī's Risāla,* n.d.

Mawdūdī, Abū Aʿlā al-:-*"Islamic Law and Constitution,"* Chapter: *The Political Theory of Islam*, 9th edition, Lahore 1986.

Mitter, U. 'The Role of Non-Arabs in the Origins of Islamic Law."'*Sharqiyyat* 9 (1997).

Mneimneh, H: 'The Spring of a New Political Salafism?' *Current Trends in Islamist Ideology*, Volume 12, October 2011.

Motzki, H: *Analysing Muslim Traditions, Studies in Legal, Exegetical and Maghāzī Ḥadīth*. Brill, Leiden and Boston, 2010.

Motzki, H: *Dating Muslim Traditions: A Survey*, Arabica LII,2 (Brill, Leiden) 2005.

Murād, 'Abd al-Ḥakīm (Tim Winter): Interview for *Dispatches - Undercover Mosque* broadcast on 15 January 2007, Channel 4 TV, United Kingdom.

Murād, 'Abd al-Ḥakīm (Tim Winter): *Understanding the Four Madhhabs: The Facts about Ijtihad and Taqlid*, Muslim Academic Trust Papers, 1999.

Nabahānī, Taqī al-Dīn al-: الشخصية الاسلامي ة Part One, Hizb al-Tahrir Publications, Dar al-Umma, Beirut, 6th ed. 2003.

Naipaul, V: *Beyond Belief, Islamic Excursions among the Converted Peoples*, Abacus, United Kingdom 2002.

Nassery, I, Ahmed, A and Tatari, M (edd.), *The Objectives of Islamic Law: The Promises and the Challenges of the Maqāṣid al-Sharīʿa,* Lexington, 2018.

Nyazee, Imran Ahsan Khan: *Islamic Jurisprudence*, 3rd. ed., Advanced Legal Studies Institute, Islamabad, 2016, Lulu.com,

Peters, R: *Crime and Punishment in Islamic Law, Theory and Practice from the Sixteenth to the Twenty-first Century*, Cambridge University Press, 2005.

Pew Survey on Muslims' opinions on Sharīʿa published in April 2013: https://www.pewforum.org/2013/04/30/the-worlds-muslims-religion-politics-society-beliefs-about-sharia/ .

Qaraḍāwī, Yūsuf al-: في فقه الاقليات المسلمة ('*On the Jurispridence of Muslim Minorities'*) Dār al-Shurūq, Cairo 1422/2001.

Quṭb, S: في ظلال القرآن , IV, (*Tafsīr sūrat al-Ḥajj*) 2426-2428.

Quṭb, S: مَـعَالِم في الطَـريق (*Milestones on the Way*), p.13, Indianapolis: American Trust Publications, 1990.

Rabb, I: 'Islamic Legal Maxims as Substantive Canons of Construction: *Ḥudūd*-Avoidance in Cases of Doubt', *Islamic Law and Society* 17 (2010) pp.63-125.

Rabb, I: "Reasonable Doubt in Islamic law," *The Yale Journal of International Law* 40:1 (2015).

Rabb, I: *Doubt in Islamic Law, A History of Legal Maxims, Interpretation, and Islamic Criminal Law*, Cambridge University Press, 2015.

Raghavan, S: "Yemen's alliance with radical Sunnis in internal war poses complication" *Washington Post*, February 11th, 2010.

Riḍā, R: *Tafsīr al-Qur'ān al-Ḥakīm* ('*Tafsīr al-Manār'*) Al-Manār Press, Cairo, 1328 AH.

Robinson, R: *Final Report of The Maldivian Penal Law and Sentencing Codification Project: Text of Draft Code (Volume 1) and Official Commentary (Volume 2),* January 2006 U of Penn Law School, Public Law Research Paper No. 09-38.

Robinson. R (et al.), 'Codifying Shari'a: International Norms, Legality and the Freedom to Invent New Forms', *Journal of Comparative Law*, 2:1, 2007, University of Pennsylvania Law School, *Public Law Working Paper* No. 06-26.

Sadeghi, B: *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition*, Cambridge University Press. 2013.

Sajaad, M: *Understanding Taqlid, Following One of the Four Great Imams*, E-book, 1432/2011.

Schacht, J: *An Introduction to Islamic Law* , Clarendon, Oxford 1982.

Schacht, J: *The Origins of Muhammadan Jurisprudence*. Oxford, UK: Clarendon Press, 1950.

Schacht, J: اصول الفقه Dār al-Kutub al-Lubnānī, Beirut, 1981

Shāfiʿī, Abū ʿAbdillāh Muḥammad al-: *Al-Shāfiʿī's Risāla,* M. Khadduri (tr.), *Treatise on the Foundations of Islamic Jurisprudence*, Islamic Texts Society, (reprint of 1961 edition).

Shāfiʿī, Abū ʿAbdillāh Muḥammad al-: اختلاف الحديث Būlāq 1321/1903.

Shāfiʿī, Abū ʿAbdillāh Muḥammad al-: الرسالة للامام الشافعي (ed A. M Shākir) Dār al-Kutub al-ʿIlmiyya, Beirut n.d.

Shaltūt, M: الإسلام عقيدة وشريعة Dār al-Shurūq 8th ed. Cairo 1421/2001.

Sharbīnī, Imām al-: الإقناع فى حل ألفاظ أبى شجاع Vol. 2. Edd: A. Muʿawwaḍ and A. al-Mawjūd, Dār al-Kutub al-ʿIlmiyya, Beirut, 3rd. ed. 1425/2004.

Shāṭibī, Ibrāhīm ibn Mūsā Abū Isḥāq al-: الموافقات في أصول الشريعة ('Congruences in the Fundamentals of the Revealed Law')

Shāṭibī, Ibrāhīm ibn Mūsā Abū Isḥāq al-: *The Reconciliation of the Fundamentals of Islamic Law* tr. I. Nyazee, ('Attributing knowledge of the sciences to the Qur'ān'), Vol. II Garnet Publishing, UK, 2014

Shawkānī, M al-: إرشاد الفحول إلى تحقيق الحق من علم الأصول Ed. Abū Ḥafṣ Sāmī ibn al-ʿArabī, Dār al-Faḍīla, Riyādh, 1st ed. 1421/2000, Vol. 2

Sheibani, M, Toft, A, and El Shamsy, A: *The Classical Period: Scripture, Origins, and Early Development* in A. Emon and R. Ahmed (edd), *The Oxford Handbook of Islamic Law*, Oxford University Press, 2018.

Sibā'ī, Salīma: المصلحة عند الطوفي من خلال التعيين في شرح الأربعين in the journal مجلة العلوم الاجتماعية والإنسانية Vol. 10, pp.281-300.

Siddiqui, S: 'The Paradoxes of Codifying Islamic Criminal Law in the Maldives'**,** *Middle East Law and Governance* 9, 2017, Brill 2017.

Sūrī, Abū Musʿab al-: دعوة المقاومة الإسلامية العالمية ('The Global Islamic Resistance Call'), https://archive.org/details/setsuko_20151004

Ṭūfī, Najm al-Dīn al-: كتاب التعيين في شرح الأربعين, ed. A. ʿUthmān, Beirut and Makka, 1419/1998.

Turābī, H al-: Article in المحرر , August 2 1994.

Turābī, H al-: تجديد الفكر الإسلامي , Dār al-Qurāfa, Morocco, 1993.

Ulph, S: *Islamism and Totalitarianism: The Challenge of Comparison*, The Westminster Institute, VA and Isaac Publishing, May 2012.

Ulph, S: تقديس السياسة أم تسييس المقدّس: مقاربة مقارنيّة ('*Sacralised politics, and the politicised sacred – a comparative approach'*) in R. Ben Salama, المقدس وتوظيفه ('*The Sacred and its Instrumentalisation'*), University of Manouba Press, Tunis 2015, pp.101-118. Online publIcation: https://www.alhiwartoday.net/node/11183 .

ʿUmar, Nāṣir bin Sulaymān bin Muḥammad al-: فقه الواقع مقوماته وآثاره ومصادره, https://islamhouse.com/ar/books/337577/ .

Unknown artist, Shiraz, dated 1400-1450. From the Keir Collection of Islamic Art, Object number K.1.2014.800.1.

Vishanoff, D: *The Formation of Islamic Hermeneutics*, New Haven, CT: American Oriental Society.

Wāsharīshī, Aḥmad al-: المعيار المعرب والجامع المغرب عن فتاوى أهل أفريقية والاتدلس والمغرب, vol.11.

Wendell, O: *Southern Pacific Co. v. Jensen 244 U.S. 205, 222*, year 1917.

Wymann-Landgraf, U: *Mālik and Madina, Islamic Legal Reasoning in the Formative Period*, Brill, Leiden 2013.

Zarkashi, Abū Abdullāh*:* البحر المحيط، في أصول الفقه, (ed .U. al-Ashqar) Vol. 4, Kuwait 1409/1988, p.165.

Zayd, M: المصلحة في التشريع الإسلامي (ed. M. Yusrī) July 2003, Dār al-Yusr, Cairo, 1954.

Zysow, A: *The Economy of Certainty, An Introduction to the Typology of Islamic Legal Theory*, Lockwood Press, 2013.

Arabic sources of in-text citations

[i] والشريعة كلها إنما هي تخلق بمكارم الأخلاق ... إلا أن مكارم الأخلاق إنما كانت على ضربين: **أحدهما** ما كان مألوفا وقريبا من المعقول المقبول ... **الضرب الثاني** وكان منه ما لا يعقل معناه من أول وهلة فأخر حتى كان من آخره تحريم الربا ... أنه كان للعرب أحكام عندهم في الجاهلية أقرها الإسلام كما قالوا في ... تقدير الدية وضربها على العاقلة ... والحكم في الخنثى وتوريث الولد للذكر مثل حظ الأنثيين والقسامة وغير ذلك مما ذكره العلماء

[ii] فكل ذلك أفعال من أفعاله، وأحكام من أحكامه لا سبب لها أصلا، ولا غرض له فيها البتة، غير ظهورها وتكوينها فقط

[iii] ولسنا نقول: إن الشرائع كلها لاسباب، بل نقول: ليس منها شئ لسبب إلا ما نص منها أنه لسبب، وما عدا ذلك فإنما هو شئ أراده الله تعالى الذي يفعل ما شاء

[iv] وهذا أيضا مما لا يسأل عنه فلا يحل لاحد أن يقول لم كان هذا السبب لهذا الحكم ولم يكن لغيره ؟ ولا أن يقول: لم جعل هذا الشئ سببا دون أن يكون غيره سببا أيضا، لان من فعل هذا السؤال فقد عصى الله عز وجل، وألحد في الدين وخالف قوله تعالى: * (لا يسأل عما يفعل) * فمن سأل عما يفعل فهو فاسق

[v] وإنما الاستحسان تلذُّذ ... ولو قال بلا خبر لازم وقياسٍ كان أقربَ من الإثم ... وجهةُ العلمِ بعدُ الكتابُ والسنةُ والإجماعُ والآثارُ، وما وصفتُ من القياس عليها

[vi] الاستحسان هو عند التحقيق عدول عن دليل ظاهر أو عن حكم كلي لدليل اقتضى هذا العدول، وليس مجرد تشريع بالهوى. وكل قاض قد تنقدح في عقله في كثير من الوقائع مصلحة حقيقية، تقتضي العدول في هذه الجزئية عما يقضي به ظاهر القانون.

[vii] السياسة ما كان فعلا يكون معه الناس أقرب إلى الصلاح ، وبعد عن الفساد, وان لم يضعه الرسول، ولا نزل به وحي.

[viii] فنهاية الأمر في تقديم المصلحة على النص هو أن تكون النصوص عبء لا فائدة منها، فالإنسان يتبع مصالحه أينما كانت ... تقوم الطريقة الحداثية ومن تأثر بها على إعمال المصالح الدنيوية المحضة، ومواكبة العصر، ومسايرة التطور، ثم وجدوا أثناء ذلك نصوصا وأدلة لا تنتج ما يريدون، فاضطروا إلى تأويلها وتحريفها حتى لا تكون عائقا عن الحداثة والتقدم

[ix] بل إن بعضهم لم يلتفت إليها أصلا إلا لما رأى ان الناس منجذبين إلى هذه النصوص فعلم أن مجرد الإعراض عن النصوص لا يكفي ... فشتان بين من ينظر في النصوص ليهتدي بها ويسير وراءها ممن يفكّر خارجها ولا يأتي إليها إلا لمهمة التخلّص منها.

[x] والظاهر لي:هو ترجيح بناء التشريع على المصلحة المرسلة، لأنه إذا لم يفتح هذا الباب جمد التشريع الإسلامي، ووقف عن مسايرة الأزمان والبيئات.ومن قال: إن كل جزئية من جزئيات مصالح الناس، في أي زمن وفي أي بيئة قد راعاها الشارع، وشرع بنصوصه ومبادئه العامة ما يشهد لها ويلائمها، فقوله لا يؤيده الواقع، فإنه مما لا ريب فيه أن بعض المصالح التي تجد لا يظهر شاهد شرعي على اعتبارها ذاتها.

[xi] ومن خاف من العبث والظلم واتباع الهوى باسم المصلحة المطلقة، يدفع خوفه بأن المصلحة المطلقة لا يبني عليها تشريع إلاّ إذا توافرت فيها الشروط الثلاثة التي بيّناها، وهي أن تكون مصلحة عامة حقيقة لا تخالف نصا شرعياً ولا مبدأ شرعياً.

[xii] على اعتبار المصالح في المعاملات وباقي الأحكام. وذلك لان مصلحة سياسة المكلفين في حقوقهم... معلومة لهم بحكم العادة والعقل. فإذا رأينا الشرع متقاعدا عن افادتها, علمنا أنا احلنا في تحصيلها على رعايتها.

[xiii] فيمكن العمل بهذا المدرك في اكثر الأعراف الجارية في المعاملات, والعادات الإجتماعية, والتقاليد السياسية التي تجلبها حضارة جديدة ... فما تعارف الناس فعله مما فيه صلاح, رددنا العرف فيه إلى أصل الإباحة, وما تعارفوا تركه مما فيه ضرر رددنا عرفه إلى أصل الحظر

[xiv] ما من فعل مما لا يحسنه العقل ولا يقبحه إلا ويجوز أن يرد الشرع بإيجابه فيدل على أنه متميز بوصف ذاتي لأجله يكون لطفا ناهيا عن الفحشاء داعيا إلى العبادة ولذلك أوجبه الله تعالى والعقل لا يستقل بدركه

[xv] ولكن لايلزم أن تكون أحكام الله في أفعال المكلفين على وفق ما تدركه عقولنا فيها من حسن أو قبح، لأن العقول مهما نضجت قد تخطئ، ولأن بعض الأفعال مما تشتبه فيه العقول، فلا تلازم بين أحكام الله وما تدركه العقول، وعلى هذا لا سبيل إلى معرفة حكم الله إلا بواسطة رسله.

[xvi] وهذا الخلاف لا يترتب عليه اثر إلا بالنسبة لمن لم تبلغهم شرائع الرسل، وأما من بلغتهم شرائع الرسل فمقياس الحسن والقبح للأفعال بالنسبة لهم ما ورد في شريعتهم لا ما تدركه عقولهم بالاتفاق

[xvii] وإن كانت الشريعة نطقت به، فلا يخلو ظاهر النطق أن يكون موافقاً لما أدى إليه البرهان فيه أو مخالفاً. فإن كان موافقاً، فلا قول هنالك. وإن كان مخالفاً، طلب هنالك تأويله ... ونحن نقطع قطعاً كل ما أدى إليه البرهان وخالفه ظاهر الشرع أن ذلك الظاهر يقبل التأويل على قانون التأويل العربي.

[xviii] فإنه لا يخفى على من له أدنى فهم أن الاجتهاد قد يسره الله للمتأخرين تيسيراً لم يكن للسابقين لأن التفاسير للكتاب العزيز قد دونت وصارت في الكثرة إلى حد لا يمكن حصره والسنة المطهرة قد دونت وتكلم الأمة على التفسير والتجريح والتصحيح والترجيح بما هو زيادة على ما يحتاج إليه المجتهد

[xix] اعتماد الفقهاء الإجماع، والقياس، والاستحسان، والمصالح المُرسلة وغيرها، مصادر لأحكامهم الفقهية، يُؤكد حق المجتمعات الإسلامية في التشريعات المناسبة لأوضاعها في إطار الثوابت المتفق عليها مجتمعياً.

[xx] فإن الحق قديم، ولا يبطله شيء، ومراجعة الحق خير من التمادي في الباطل... فلا يمنعك الاجتهاد الأول من إعادته، فإن الاجتهاد قد يتغير، ولا يكون الاجتهاد الأول مانعاً من العمل بالثاني إذا ظهر أنه الحق

[xxi] يستغلوا بما في كتبنا نحن, في مبادئنا نحن. ستجد ان اكثر ما ينقدها لا ينقد فكرها- ينقد فعلها...فإذا الفكرة الأصلية, والمنبت الأصلي: منبت سلفي . استغلوا مبدءا موجودا عندنا في كتبنا وبين اظهرنا. بال هناك من يعمل نفس الفكر لكن باسلوب مهذب.

[xxii] إنهم - في الجيل الأول - لم يكونوا يقرؤون القرآن بقصد الثقافة والاطلاع ... إنما كان يتلقى القرآن ليتلقى أمر الله في خاصة شأنه وشأن الجماعة التي يعيش فيها، وشأن الحياة التي يحياها هو وجماعته، يتلقى ذلك الأمر ليعمل به فور سماعه ، كما يتلقى الجندي في الميدان "الأمر اليومي

[xxiii] فكتاب الله هو الهادي إلى كل خير، والمعين على فهم كل قضية، فلو أخذنا مثلا قضية معاصرة، وأردنا تحليلها، والتأمل في حقيقتها ومآلها، فمن خلالها يتضح لنا الأمر

[xxiv] وَمَنْ يُشَاقِقِ الرَّسُولَ مِنْ بَعْدِ مَا تَبَيَّنَ لَهُ الْهُدَىٰ وَيَتَّبِعْ غَيْرَ سَبِيلِ الْمُؤْمِنِينَ نُوَلِّهِ مَا تَوَلَّىٰ وَنُصْلِهِ جَهَنَّمَ وَسَاءَتْ مَصِيرًا

[xxv] إنَّ تطوير مفهومنا لمبدأ الإجماع في العصر الحديث، يتطلب أن يتسع لندرك أن (الإجماع) اليوم ما هو إلا (التجسيد الشرعي) لقاعدة (الأكثرية) في التصويت البرلماني على التشريعات القانونية الصادرة من السلطة التشريعية، بديلاً عن الاجتهادات الفردية والمذاهب الفقهية القديمة. وهذا يفسح المجال أمام المشرع لاختيار الأنسب من الآراء الفقهية لاحتياجات مجتمعاتنا والأكثر انسجاماً مع روح العصر ومواثيق حقوق الإنسان، خاصة في مجالات: أحكام الأسرة وحقوق المرأة والعلاقة مع الآخر، فهو المقصود، بالطاعة لأولي الأمر (وأَطِيعُوا الله وأَطِيعُوا الرسول وأولي الأمر منكم) فطاعتهم تعني: طاعة أفراد المجتمع جميعاً للتشريعات الصادرة، بغض النظر عن مذاهبهم الفقهية.

[xxvi] اذا كان السياق الداخلي المتصل ببنة النص النظمية الداخلية جليا – بشكل عام – في تراث المسلمين القرأني والفقهي والأصولي ... فإن استيعاب السياق الخارجي, في المقابل, لا يزال بحاجة إلى مزيد من البحث والدراسة.

[xxvii] فالسياق المعاصر يحبل بتوازل وتطورات جديدة تستدعي فهما عميقا وإدراكا واعيا, وتقتضي تحكما في ناصية هذا السياق حتى يكون الإجتهاد في المستوى المطلوب. خاصة إذا أدركنا ان هذه التوازل والتطورات مختلفة في طبيعتها عن التوازل والتطورات التي" عالجها" النظر الإسلامي من قبل.

[xxviii] الاسلام لم يأت بحدود لم تكن معروفة عند العرب وكان الرسول يراعي العرف السائد في ذلك الوقت، وقد تغير الزمن وتغيرت الأعراف التي يجب مراعاتها، بل إن الحدود لا تطبق إذا خيف على المسلمين من ترك دينهم، فالشريعة في أصلها لا ينبغي أن تكون صادة عن العقيدة

[xxix] من ذلك وصف العصر بأنه عصر ضرورة، ومن ذلك وصف العصر بأنه عصر شبهة، ومن ذلك وصف العصر بأنه عصر فتنة، ومن ذلك وصف العصر بأنه عصر جهالة، وهذه الأوصاف تؤثر في الحكم الشرعي

[xxx] لمدة نحو ألف سنة لم تقم الحدود في بلد مثل مصر، وذلك لعدم توفر الشروط الشرعية التي رسمت طرقا معينة للإثبات، والتي نصت على إمكانية العودة في الإقرار

[xxxi] ومعلوم أن عصرنا لم يعد أمسه يعاش في يومنا، ولا يومنا يعاش في غدنا، وسبب ذلك أمور: منها: كم الاتصالات والمواصلات والتقنيات الحديثة التي جعلت البشر يعيشون وكأنهم في قرية واحدة، ومنها زيادة عدد البشر ... ومنها كم العلوم التي نشأت لإدراك واقع الإنسان في نفسه أو باعتباره جزءاً من الاجتماع البشري

[xxxii] والظاهر لي:هو ترجيح بناء التشريع على المصلحة المرسلة، لأنه إذا لم يفتح هذا الباب جمد التشريع الإسلامي، ووقف عن مسايرة الأزمان والبيئات.ومن قال: إن كل جزئية من جزئيات مصالح الناس، في أي زمن وفي أي بيئة قد راعاها الشارع، وشرع بنصوصه ومبادئه العامة ما يشهد لها ويلائمها، فقوله لا يؤيده الواقع.

[xxxiii] حَتَّىٰ يُعْطُوا الْجِزْيَةَ عَنْ يَدٍ وَهُمْ صَاغِرُونَ

[xxxiv] قوله: {حَتَّى يُعْطُوا الْجِزْيَةَ }: أي إن لم يسلموا {عَنْ يَدٍ}: أي عن قهر لهم وغلبة {وَهُمْ صَاغِرُونَ}: أي ذليلون حقيرون مهانون، فلهذا لا يجوز إعزاز أهل الذمة ولا رفعهم على المسلمين بل هم أذلاء صغرة أشقياء، كما جاء في صحيح مسلم: «لا تبدأوا اليهود والنصارى بالسلام، وإذا لقيتم أحدهم في طريق فاضطروهم إلى أضيقه.«ولهذا اشترط عليهم أمير المؤمنين عمر بن الخطاب رضي اللّه عنه تلك الشروط المعروفة في إذلالهم وتصغيرهم وتحقيرهم

[xxxv] أن أحكام الحدود بإجماع الفقهاء تزول ... كما ذهب بعض الفقهاء إلى أنها تسقط بالتوبة ... هذا الأمر جعل ولى الأمر المصرى يلجأ إلى استخدام القانون حرصا على سلامة واستقرار وتماسك المجتمع، حيث يتضمن القانون عقوبات رادعة لاتسقط بالشبهة ، أو التوبة .